IN THE FIFTY-FOURTH DISTRICT COURT OF
McLENNAN COUNTY, TEXAS

AND

IN THE COURT OF CRIMINAL APPEALS,
AUSTIN, TEXAS

Ex Parte DAVID WAYNE SPENCE,

Applicant

Cause No. _____

Petition for Post-Conviction Writ of Habeas Corpus

THIS IS A CAPITAL CASE.
MR. SPENCE'S EXECUTION IS IMMINENT, SCHEDULED
FOR THURSDAY, OCTOBER 17, 1991, AT
JUST PAST MIDNIGHT.

Robert C. Owen
Texas Bar No. 15371950
Eden E. Harrington
Texas Bar No. 09048000
Raoul D. Schonemann
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PETITION FOR POST-CONVICTION
WRIT OF HABEAS CORPUS

Comes now Applicant, DAVID WAYNE SPENCE, and petitions this Court, pursuant to Art. 11.07 of the Texas Code of Criminal Procedure, to stay his imminent execution and issue a Writ of Habeas Corpus, and order his release from confinement on the grounds that he is being denied his liberty as a result of an unconstitutional judgment of conviction and sentence of death.

STATEMENT OF THE CASE

David Spence is a thirty-three year old white man from Waco, Texas. The offense underlying his capital conviction occurred in 1982; Mr. Spence was tried and convicted in the summer of 1984. He is indigent and currently incarcerated at the Ellis One Unit of the Texas Department of Criminal Justice, Institutional Division (formerly the Texas Department of Corrections) in Huntsville, Texas. James A. Collins is the state official responsible for carrying out Mr. Spence's confinement and death sentence.

In November, 1983, a McLennan County grand jury indicted Mr. Spence for the capital murder of Jill Montgomery. His trial was held in the 54th District Court of McLennan County after the court refused a change of venue. After a jury trial on the issue of guilt/innocence, Mr. Spence was found guilty of the charge. The jury subsequently returned "Yes" answers to the two special issue questions which alone determined sentence under former Tex. Code Crim. Proc. Art. 37.071. Mr. Spence was then sentenced to death as required by that statute. A copy of the judgment is attached to this Petition as Exhibit A. The Texas Court of Criminal Appeals subsequently affirmed his conviction and sentence. Spence v. State, ___S.W.2d___ (Tex. Crim. App. 1990). The United States Supreme Court denied review, Spence v. Texas, __ U.S.___, ___L.Ed.2d___ (1991). The trial court subsequently set Mr. Spence's execution for just after midnight on Thursday, October 17, 1991. This action followed.

INTRODUCTION

1. This case arose from the murder of three central Texas teenagers in Waco, Texas, during the summer of 1982. The bodies of Kenneth Franks, Jill Montgomery, and Raylene Rice were discovered on the evening of July 14, 1982, in Speegleville Park, on the shores of Lake Waco. All three had died from stab wounds. The killings quickly became notorious as the "Lake Waco Murders."

2. The investigation of the "Lake Waco Murders," and the prosecutors' subsequent machinations to convict David Spence of capital murder in connection with two of those deaths, spanned a period of nearly four years. Scores of witnesses and potential witnesses were located and interviewed by law enforcement officials. Literally hundreds of reports, summaries, statements, and documents were prepared by public and private agencies alike. The trial transcripts themselves run to thousands of pages. The amount of information that must be sifted through to decipher the history of the case is staggering.

3. Undersigned counsel have represented Mr. Spence for less than two months. In that short time, counsel have already discovered strong indications of astonishing state misconduct in the prosecutors' single-minded pursuit of David Spence for the "Lake Waco Murders." The results of preliminary investigation indicate that the prosecutors' lawless acts included the concealment of exculpatory evidence, the secret consummation and public denial of "deals" with State witnesses (trading leniency

and favorable treatment for testimony), and the knowing presentation of false testimony. See infra.

4. Undersigned counsel continue to investigate these manifold allegations of constitutional violations. Hamstrung by limited resources and dwindling time, and racing against an imminent execution date, counsel have been forced to file this Petition even though their investigation of Mr. Spence's case has only just begun. Accordingly, this Petition is presented as a good-faith initial pleading, to demonstrate the work already done on Mr. Spence's case and to suggest the enormity of the task still ahead. Counsel assure this Court that an amended pleading is forthcoming, to include more detailed factual allegations and additional claims for relief, so that all Mr. Spence's colorable challenges to his conviction and sentence may be litigated in a single proceeding. This approach will best conserve scarce judicial resources and promote the full and fair adjudication of Mr. Spence's case.

5. Hand in hand with the need for additional time to complete the investigation and presentation of Mr. Spence's case, counsel will also request full discovery in this matter.[1] The materials which form the basis of the present Brady, Giglio, and Napue claims (see infra) were obtained from the record of the 1989 remand hearing; counsel assert, upon information and belief,

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[1] Counsel will make this request by a separate discovery motion, describing specifically and in detail those materials whose disclosure is necessary to the full and fair adjudication of Mr. Spence's Petition. That motion is forthcoming.

that those materials do not comprise the complete prosecutors' files in this case.[2] Accordingly, discovery will be necessary.

6. In addition to the need for discovery, counsel will require expert assistance to evaluate and present some of Mr. Spence's claims for relief. Newly available physical evidence must be examined and tested by the most reliable means, **including DNA testing**; Mr. Spence must be evaluated by competent mental health professionals, and much of the State's original physical evidence (e.g., its tape recordings of the hypnotic reversion of several prosecution witnesses), based on new information, must be subjected to renewed scrutiny. All this essential activity will likewise require time and resources.

7. In sum: while Mr. Spence's present Petition presents numerous meritorious issues, it is necessarily incomplete and will have to be supplemented in the future. A great deal of critical work remains to be done, and additional claims certainly will arise that will warrant this Court's careful consideration. Counsel must still complete a careful reading of the entire

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[2] The Court of Criminal Appeals remanded Mr. Spence's case for an evidentiary hearing during the pendency of his direct appeal. That Court had determined that the record in the trial court was inadequate to resolve Mr. Spence's claim of prejudicial pre-indictment delay. Accordingly, it remanded the case to the trial court for a hearing to complete the "bill of exceptions" counsel was not allowed to make at trial. Attached as an exhibit to the record of the remand hearing is a set of documents alleged to be the prosecutors' files in their prosecution of Mr. Spence. Upon information and belief, much of the material in these files were never disclosed to the defense before or during trial. As explained infra (See Claims for Relief), much of this material was exculpatory evidence whose disclosure was compelled by the Sixth and Fourteenth Amendments.

record of both Mr. Spence's trials (which time constraints to date have not permitted counsel), discuss new developments in the case with Mr. Spence's trial and appellate counsel (whose knowledge of facts is essential to assist postconviction counsel), investigate Mr. Spence's personal background and mental/emotional health, interview jurors and numerous other witnesses, confer regarding the case in much greater detail with Mr. Spence, and so on. Accordingly, undersigned counsel do not -- cannot -- contend that the attached Petition exhausts Mr. Spence's meritorious constitution claims. Instead, counsel assert that the Petition is a good-faith initial pleading of claims already identified in the case, and express their firm intention to complete the investigation and presentation of Mr. Spence's case at the earliest possible date.

CLAIMS FOR RELIEF

THE PROSECUTION CONCEALED RELEVANT AND MATERIAL EXCULPATORY AND MITIGATING EVIDENCE.

8. The Constitution requires that the State disclose information in its possession which is material and favorable to an accused. Brady v. Maryland, 373 U.S. 83 (1963). In Mr. Spence's case, the prosecutors concealed material evidence that linked several other individuals to the commission of the crime, and which tended to demonstrate Mr. Spence's innocence. In addition, the State suppressed evidence which impeached the testimony of its principal witnesses at trial, and of "deals" made with witnesses in exchange for their testimony. Make no mistake: the prosecutors in Mr. Spence's case engaged in a campaign of deception that was breathtaking in its scope; they refused to disclose evidence that was essential to Mr. Spence's defense, and concealed facts that would have exposed their own witnesses as liars. The cumulative effect of the prosecutors' multifarious violations of rights guaranteed to Mr. Spence by the federal Constitution and the laws of Texas, including but not limited to those detailed here, was to deny him a fundamentally fair trial. Mr. Spence's conviction and sentence must be overturned.

9. First and foremost, the documents concealed by the prosecution reveal a consistent theme of relationships among the deceased teenagers and other likely suspects in the murders: drug use and drug trading. This evidence, of course, directly

contradicts the prosecution's bizarre "mistaken identity/murder for hire" theory.

10. Far from being the saintly, cheerful teen he was later depicted as having been,[3] Ken Franks was a darkly troubled young man who was no stranger to the wrong side of the law. Documents in the possession of the prosecution, which were never disclosed to the defense, reveal witnesses' assertions that:

-- Ken Franks was a major drug dealer who was deep in debt (owing more than three thousand dollars) ($3000.00) to his own suppliers of dope.

-- Ken Franks had recently begun a partnership with a new "supplier" of amphetamines and marijuana, and told Gayle Kelley he expected that they would be "coming into a lot of money soon."

-- Despite his optimism about his plans for increasing success as a dope peddler, Ken Franks warned Gayle Kelley that his new "supplier" was so dangerous that he couldn't give him her name, out of fear for her safety.

-- One of Franks' drug-dealing associates was a young woman named Rebecca Desmarais. Desmarais, in turn, was linked to a man named Tab Harper, whom Gayle Kelley told police she suspected could have been Ken Franks' new "supplier."

-- Harper, for his part, bragged to Desmarais on the morning of July 14, 1982, about having killed three people (2 women and a man) at Speegleville Park -- hours before the bodies were found, and hours before the first news reports of the killings were aired.

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[3] Admittedly, the prosecution acknowledged Ken Franks' drug use. See, e.g., S.F. Vol. V at 721 (testimony of Gayle Kelley). However, the mild characterizations of Ken's relationship with drugs, as described by the State's witnesses, are completely at odds with the portrait of a hard-edged "dealer" that emerges from other documents in the prosecutors' possession, which they never disclosed.

-- Harper, an ex-convict, had previously asked around in his own circle of violent thugs, looking for someone who was interested in joining him to stalk and kill a prostitute.

-- Harper was identified by several persons as having been present in Koehne Park on the evening of July 13, 1982.

-- Another witness acknowledged that she had seen Tab Harper and a Mark Boatwright come up in a boat to a landing in Midway Park. Soon afterwards, she recounted, Harper started remarking that he had killed three kids, two girls and a boy, and the witness had gotten sick at her stomach and had left the area where Harper and his friend were located.

11. In addition to providing a coherent alternative theory to explain the murder of the three teenagers, other documents in the State's file demonstrate that the testimony of key prosecution witnesses at trial was either unforgivably incomplete (that is, affirmatively misleading), or downright false. For example, supposedly grieving father Richard Franks never hinted from the witness stand that, when he first telephoned Gayle Kelley on the morning after the kids had failed to come home, he expressed sarcastic concern that Kenneth might have gotten "what he deserved."

12. In fact, a great deal of highly suspicious information about Richard Franks (which, of course, was exculpatory information with respect to Mr. Spence), was never revealed to the defense. For example, during police-administered questioning on July 23, 1982, concerning his activities on the night of the murders, Franks responded as follows:

Q: Were you with Kenneth and the two girls when they were stabbed?

A: Oh God, I was with them every minute all night when they were killed.

Q: Did you cause the death of Kenneth and the two girls?

A: No. [After a short pause, Franks began to sob uncontrollably and continued,] I don't have any guilt feelings about causing their deaths. [Franks' words then became incoherent].

13. In addition to these startling revelations, Richard Franks claimed during the same examination that he did not "go to Koehne Park on Tuesday night, July 13, before midnight." This assertion was directly contrary to Franks' subsequent testimony at Mr. Spence's trial. See generally S.F. Vol. I at 71-135. Another officer who observed that same interview reported that Franks "seemed to be at a loss to give a close estimate of time ... of his activities on Tuesday evening, July 13, 1982." In addition, Franks told at least one civilian witness that he was familiar with the part of Speegleville Park where the teens' bodies were recovered -- in fact, that he had camped in that area before. All this information was "Brady material" which the prosecutors were duty-bound to disclose, but which they chose instead to conceal from defense counsel -- and, through them, from the jury that convicted Mr. Spence and sentenced him to die.[4]

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[4] Franks gave these answers in response to questions during a polygraph examination. Although it is uncertain whether the polygraph results themselves (several of which strongly indicated deception) would have been admissible at the guilt-innocence phase of the trial, there are at least three reasons that the State's failure to disclose them violates the rule of Brady and its progeny. First, Brady requires that the State disclose not only exculpatory and mitigating evidence, but evidence that leads to such evidence. Richard Franks' inability to pass a lie detector test about the lake murders could

(continued...)

14. Other exculpatory information in the hands of the prosecution, also tending to support the theory that Ken Franks was killed in a dispute over a drug transaction (and that Jill and Raylene were slain to prevent their identifying Franks' killers), was concealed. For example, only fifteen days after the murders, the police received information comprising a remarkably complete picture of the incident: a "subject" was reported to have gone to Koehne Park on the evening of July 13 to collect $3,000 that Ken Franks owed him and/or others for drugs.

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[4](...continued)
certainly have led to the discovery of other admissible evidence favorable to Mr. Spence. Second, the answers **themselves**, independent of the polygraph results indicating "deception" or "truthfulness" with respect to each, are prior inconsistent statements that should be available for cross-examination of a witness who testifies differently at trial, since the answers can certainly be proffered for impeachment without revealing that they were given during a polygraph examination, much less what the "results" of the polygraph were.

Third, the Constitution limits the extent to which a State may exclude probative evidence at the penalty phase of a capital murder trial based on a hypertechnical interpretation of state evidentiary rules. Green v. Georgia, 442 U.S. 95 (1979). In Green, the Supreme Court ruled that hearsay evidence which raised a doubt as to the defendant's guilt could not be excluded in the sentencing phase. Id. at 97. The same concerns expressed by the Court in that decision apply with equal force to the question of polygraph evidence. Although applicable Texas caselaw may preclude the admission of the polygraph results, see Nethery v. State, 692 S.W.2d 686, 700 (Tex. Crim. App. 1985), the Supreme Court's holding in Green mandates that the "mechanical" application of state evidentiary rules not be permitted to supersede a defendant's rights under the Federal Constitution to due process of law. The State's suppression of the polygraph evidence in this case thus deprived Mr. Spence of important mitigating evidence which he otherwise could have presented at the second phase of trial in support of a sentence less than death. As a result, the State's failure to disclose the fact that Richard Franks failed a lie detector test about the lake murders violated Mr. Spence's rights under the United States Constitution.

When Franks could not or would not pay, the "subject" and four "associates" took Franks, Montgomery, and Rice to Speegleville Park; once there, a brawl between the "subject" and Franks ended in the latter's death. The girls were killed to remove any witnesses. The appealing simplicity of this version of events is plain; it explains, much more reasonably than the State's tortured theory, why the bodies were found in Speegleville Park rather than Koehne. Equally plain, this account was exculpatory with respect to Mr. Spence and certainly should have been disclosed under Brady.

15. Other evidence, which was both exculpatory with respect to Mr. Spence and impeaching with respect to the prosecution's witnesses, was concealed by the State. For example, the police had information that Bobby Brem, who testified at trial, himself had publicly threatened to kill Kenneth Franks only four months before Franks' ugly death. In addition, the prosecution had statements from witnesses asserting that Bobby was seen cruising through Koehne Park on the night of the murder. The prosecution made certain that this information was not available to defense counsel for cross-examining Bobby at trial.

16. The prosecution also concealed information which, while not independently exculpatory, served to corroborate the reliability of the evidence of Ken Franks' drug dealing. For instance, the Waxahachie Police had received numerous phone calls from informants, uniformly asserting that Jill Montgomery was a heavy user of drugs, which certainly would have come as a

surprise to the jurors who heard the State's carefully sanitized version of events at trial. This corroborating evidence did not come solely from anonymous accusers, however; one witness had heard from Rod Montgomery, Jill's father, that she was tapping a new "connection" in Waco to satisfy her increasing appetite for amphetamines. Numerous other named witnesses confirmed Jill's drug habit; former Methodist Home resident Ginger Yoby, for example, asserted that Jill "was wrapped up in drugs a whole lot and made a lot of deals to get drugs and took a lot of speed and marijuana." Micki Rhoden, another Methodist Home student and a former roommate of Jill's, added the damning admission that Jill had introduced her to illegal drugs, including "speed."

17. Perhaps the most striking of these never-revealed accounts, however, was that of Raynell Rice, sister of the deceased Raylene, who acknowledged that Jill's amphetamine habit at the time of her death had required three to four "hits" of "speed" daily (Jill favored "black mollies") to sate. Rice also contradicted the State's carefully crafted portrait of Jill and Kenneth as still romantically linked; Jill, Rice told authorities, was dating a "Mexican" guy, possibly a Methodist Home resident, at the time of her death. These powerful facts, offered by someone whose personal relationship with the deceased girls strongly supports their credibility, would have devastated the prosecution's case at both phases of trial.

18. Similarly, Jill's stepfather, Bernie Shaw, had confided to law enforcement officers that Raylene Rice was "deep into

buying and selling dope." Another witness recounted that the people in the "orange Pinto" in Koehne Park on the night of the murder were selling drugs out of their car. All this information corroborates the theory that the trio were likely murdered in a dispute over illegal drugs.

19. The foregoing is only a representative sampling of items from the prosecutors' files that plainly should have been, but never were, disclosed to the defense. As indicated supra, habeas counsel continue to investigate and develop the evidence concealed by the prosecutors in Mr. Spence's case. Even without additional development, however, the existing evidence, including but not limited to the foregoing, demonstrates that Mr. Spence's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution were violated and that his conviction and sentence must be reversed.

THE PROSECUTION CUT "DEALS" WITH MANY OF ITS WITNESSES IN RETURN FOR THEIR TESTIMONY AGAINST MR. SPENCE, AND THEN DENIED THE EXISTENCE OF ANY SUCH AGREEMENTS.

20. Upon information and belief, numerous prosecution witnesses testified in return for consideration from the State. This consideration took many forms, many of them shocking. While some witnesses received assistance from law enforcement officers in bargaining for lenient treatment on other charges, or were promised help in obtaining parole or release, others earned, or were promised, more material rewards. Several prisoners were even permitted unsupervised visits with spouses or girlfriends in

the district attorney's offices, where they were allowed to engage in sexual intercourse. Others were privileged, in direct violation of the most basic principles of correctional security, to possess currency (cash money) inside the jail. Still others were rewarded with gifts of "free world" food, cigarettes, and even liquor for their help in manufacturing the State's case against David Spence. The prosecutors' refusal to disclose their agreements with these witnesses, with the result that the jury never heard about the witnesses' overwhelming incentive to testify in a manner favorable to their paymasters, deprived Mr. Spence of a fundamentally fair trial. Mr. Spence's conviction cannot stand.

21. Evidence concerning the potential bias or interest of a government witness in testifying in a particular manner falls within the definition of exculpatory evidence to which a defendant is entitled under the Constitution. Giglio v. United States, 405 U.S. 150 (1972). This impeachment evidence is "favorable to an accused," Brady v. Maryland, 373 U.S. 83, 87 (1963), and must be delivered to the defense upon request because "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend," Napue v. Illinois, 360 U.S. 264, 269 (1959).

22. But for the testimony of these bias-tainted witnesses, the case against Mr. Spence was completely circumstantial.

Indisputably, those "subtle factors" could have convinced the jury that various witnesses' accounts of Mr. Spence's "confessions" were fraudulent, having been fabricated out of pure self-interest. Mr. Spence's conviction must be reversed.

THE PROSECUTION FABRICATED EVIDENCE AND KNOWINGLY PRESENTED FALSE TESTIMONY.

23. In their reckless crusade to convict David Spence of the "Lake Waco Murders" and thereby close an investigation that had dragged on for months, the McLennan county prosecutors betrayed the solemn commands of Tex. Code Crim. Proc. Art. 2.01: "It shall be the primary duty of all prosecuting attorneys ... not to convict, but to see that justice is done." Not only did the prosecutors cut lucrative deals with jailhouse informants and suppress evidence of Mr. Spence's innocence, but they committed the most reprehensible abuse of state power of which a prosecutor may be accused: they manufactured inculpatory evidence and knowingly presented false testimony by numerous witnesses. The prosecutors' actions wholly robbed Mr. Spence's trial of the fundamental fairness that is the bedrock of constitutional due process. This court must award Mr. Spence a new trial. Napue v. Illinois, 360 U.S. 254 (1959).

24. It will not surprise this Court that the prosecutors' most eager allies in their campaign of confabulation were jailhouse "snitches," both at the McLennan County Jail and in the

Texas Department of Corrections.[5] Several such informants have already disavowed the testimony elicited from them and others by the prosecutors at Mr. Spence's trial. See generally S.F. (Hearing on Remand from the Court of Criminal Appeals) Vols. I, II. Others have acknowledged that they, with the able assistance of law enforcement officers such as Deputy Truman Simons (who supplied them with sufficient confidential information to give their manufactured "statements" the ring of truth), concocted bogus "confessions" and passed them off as the words of David Spence. For the "snitches" with bad memories, photographs of the crime scene and of the bodies of the deceased teenagers were provided by helpful law enforcement officers.

25. There can be no question that the prosecutors and the law enforcement officers they supervised were engaged in a large-scale program of manufacturing inculpatory evidence. They knew that the statements offered by their pet "snitches" were lies, because they had planted the only corroborating information contained in them. Indeed, the prosecutors attempted to ingratiate themselves with the inmates who stonily refused to cooperate, pleading with them to claim that Mr. Spence had shared a careless whisper. Despite the patent falsehood of these painstakingly crafted statements, the prosecutors shamelessly built a "case" against Mr. Spence upon their foundation.

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[5] Now the Texas Department of Criminal Justice, Institutional Division.

26. The prosecutors presented other testimony that they knew was false. In an attempt to bolster their far-fetched theory of the case, they presented the testimony of Gayle Kelley, a close friend of the deceased Ken Franks, to recount an incident in which David Spence, sneering, threatened her friend Patti Deis with a malevolent, "I wonder how it would feel to live to be 18." S.F. (trial) Vol. V at 743-744. It made a good story, and no doubt made a chilling impression on the jury; the only problem was, it was a lie -- and the prosecution knew it. Police reports in the hands of the State (concealed from trial counsel and only recently available to undersigned counsel) confirmed that the incident described happened not between Patti and David Spence, but between Patti and some anonymous "biker." The State thus, again, knowingly presented false testimony to deceive the jury into convicting Mr. Spence, in plain and harmful violation of Napue.

27. In a somewhat more complex maneuver, the prosecution sought to leave the jury with the impression that a moldy, hardly identifiable stick found near the bodies had its origin as a "smooth object, such as a stick or broom handle," S.F. Vol. VIII at 1220. The prosecutors, of course, had carefully instructed their "snitches" to recount that David had described using such a stick as a tool of sexual torture during the murder. See S.F. Vol. X at 1527 (prosecution introduces photos of stick found at scene). What the prosecutors conveniently neglected to admit to the jury was that the only such "stick" which could be reliably

traced to David Spence had never left his mother's home -- because, according to a witness statement in the possession of the police, it was seen in that house months after the murders. This was yet another example of the prosecution's manufacturing of inculpatory evidence, requiring the reversal of Mr. Spence's sentence.

28. Undersigned counsel continue to parse the thousands of pages of documentation that accompany Mr. Spence's trial records. As they do so, they are confident that the Napue violations will continue to multiply. Even on the strength of those recounted here alone, however, Mr. Spence must be granted habeas relief.

THE ADMISSION OF THE TESTIMONY OF FORENSIC ODONTOLOGIST DR. HOMER CAMPBELL VIOLATED MR. SPENCE'S RIGHTS UNDER FEDERAL AND STATE LAW.

29. The State's case at the guilt phase rested heavily upon the testimony of forensic odontologist Dr. Homer Campbell. Dr. Campbell testified that he could identify alleged "bite marks" on the body of Jill Montgomery as having been made by the teeth of David Spence. Dr. Campbell never examined or tested the allegedly bitten skin; he drew his conclusions entirely from studying photographs of the body and plaster models of Mr. Spence's teeth. Despite this shaky foundation, Dr. Campbell assured the jury that his opinion linking Mr. Spence to the alleged "bite marks" was offered "to a medical and dental certainty." The admission of Dr. Campbell's testimony violated Mr. Spence's rights under the U.S. Constitution and the

onstitution and laws of the State of Texas. Mr. Spence's onviction cannot stand.

30. Upon information and belief, the methodology employed y Dr. Campbell is notoriously inaccurate and fraught with herent unreliability.[6] The field of forensic odontology qua cience may be sufficiently established to justify the admission f such testimony in a non-capital case; however, on the articular facts of this trial, the admission of Dr. Campbell's estimony violated the Eighth and Fourteenth Amendments' equirement of "heightened reliability" in capital cases. See ohnson v. Mississippi, 486 U.S. 578 (1988); Beck v. Alabama, 447 .S. 625 (1980); Gardner v. Florida, 430 U.S. 349 (1977); Woodson North Carolina, 428 U.S. 280 (1976).

31. In addition, upon information and belief, the rosecution failed to disclose evidence that Dr. Campbell, in rticular, had made numerous and serious misidentifications in ie past, as a result of his characteristic method of forensic dontology. The prosecutors were constitutionally required to ivulge this information, and their failure to do so, given the ritical importance of Dr. Campbell's testimony, deprived Mr.

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[6] Undersigned counsel continues to investigate and develop his claim. The adequate exploration and presentation of this hallenge will require additional time, discovery of certain aterials presently unavailable (because they are in the hands of ie prosecution), the assistance of expert witnesses, and an videntiary hearing. As detailed elsewhere in the present etition, undersigned counsel faces an extraordinary task in itigating Mr. Spence's voluminous case, and is attempting to resent his challenges to this Court in as expeditious a fashion s possible, given the constraints of limited resources and time.

Spence of a fundamentally fair trial and requires that his conviction be set aside. Brady v. Maryland, 373 U.S. 83 (1963).

THE STATE PRESENTED IMPERMISSIBLY INFLAMMATORY AND PREJUDICIAL EVIDENCE AND ARGUMENT CONCERNING THE CHARACTER AND WORTH OF THE DECEASED.

32. At both phases of Mr. Spence's trial, the prosecution presented impermissibly inflammatory and prejudicial evidence and argument concerning the character of the deceased and the effect of their deaths on others. See infra. These actions of the prosecutor robbed Mr. Spence of a fundamentally fair trial at both the guilt and punishment phases, and require that this court reverse Mr. Spence's conviction and sentence.

33. The prosecutor presented irrelevant "victim impact" evidence through the testimony of its witnesses at the guilt phase. See, e.g., S.F. (trial) Vol. I at 76 (Franks' father describes Ken's star-crossed romance with Jill), 101 (describing Ken's eighteenth birthday party), 106 (praising Ken for talking Gayle Kelley into returning to school to finish her education), 113 (Ken was popular and well-liked), 118 (Ken enjoyed going to the movies and had numerous friends), 186 (Jill was improving in school), 187 (Jill was very friendly and was a success at her part-time job as a tour guide). None of this evidence was relevant to any issue properly before the jury; it was offered solely to inflame the jurors and distract them from their task of critically examining the State's case against Mr. Spence.

34. In their guilt phase argument, the prosecutors continued to demand that the jurors consider the pain and grief of the deceased and their families in determining Mr. Spence's guilt. See S.F. Vol. XIII at 1967 (discussing the parents' "pain" for more than two years), 1970 (expressing feelings of sorrow for Kenneth Franks' father), 1983 ("Mrs. Shaw never dreamed when her little girl dropped her off at work that would be the very last time she would ever see her alive. She told you how things were going, their lives had straightened out .. [Jill's] grades were good"), 2004 (arguing that a lot of people have been waiting two years for the jury's decision). This inflammatory argument was wholly irrelevant to the question of whether the State had met its burden of proof in the case; instead, it was offered to stampede the jury into a "guilty" verdict on account of their sympathy for the deceased and their families. Such argument, by definition, deprives a defendant of a fundamentally fair trial.

35. At closing argument during the penalty phase, the prosecutor hammered away repeatedly at the theme that the jury should ignore its responsibility for Mr. Spence's fate by focusing on the character of the deceased. See e.g., S.F. (trial) Vol. XV at 2347 (Feazell can "see Jill's smile" in her mother's smile), 2347 (Feazell "choking back tears" for Richard Franks), 2356. This argument was improper because it bore no relevance to the "character of the [defendant] and the circumstances of the crime." Zant v. Stephens, 462 U.S. 862

(1983). Even if it bore tangential relevance to Mr. Spence's "personal responsibility and moral guilt," Enmund v. Florida, 458 U.S. 782, 801 (1982), this argument was so prejudicial that it prevented the jury's consideration of mitigating evidence on behalf of a life sentence for Mr. Spence.

36. The Supreme Court recently acknowledged that, while some evidence of the "specific harm caused by the defendant" is constitutionally admissible, if "[victim impact] evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." Payne v. Tennessee, No. 90-5721, slip op. at 15 (June 27, 1991). See also Albrecht v. State, 486 S.W.2d 97, 99-100 (Tex. Crim. App. 1972); Bryant v. State, 271 S.W.2d 610 (Tex. Crim. App. 1975); James v. State, 772 S.W.2d 84 (Tex. Crim. App. 1989).

37. Mr. Spence's trial was rendered fundamentally unfair by the State's improper emphasis on highly prejudicial evidence regarding the victims' worth and the impact of their death, as described above. The testimony and argument presented by the State far exceeded a description of "specific harm caused by the defendant." Instead, it constituted a strong emotional appeal to the jury to sentence Mr. Spence to death precisely because the deceased teens were attractive, hard-working, a devoted daughter, etc. The prosecutor's improper presentation of this prejudicial argument about the deceased rendered Mr. Spence's trial fundamentally unfair because it undermined the reliability of his

conviction and sentence. Consequently, Mr. Spence's due process rights under the Sixth and Fourteenth Amendments, and his fundamental rights under Texas law, were violated and his sentence must be reversed.

THE PROSECUTION USED DR. JOLIFF TO INTERROGATE MR. SPENCE, AND THROUGH THAT QUESTIONING OBTAINED INCRIMINATING EVIDENCE AGAINST MR. SPENCE.

38. Dr. James Joliff interrogated Mr. Spence while he was imprisoned at the McLennan County Jail. Upon information and belief, agents of the State including Deputy Truman Simons eavesdropped on this interrogation and obtained incriminating evidence against Mr. Spence.[7] Dr. Joliff failed to inform Mr. Spence of his rights under Miranda v. Arizona, 384 U.S. 436 (1966), before questioning him concerning the "Lake Waco Murders." S.F. (trial) Vol. XIV at 2033. The prosecution's use of evidence obtained through Dr. Joliff's interrogation of Mr. Spence, conducted in the absence of the Fifth Amendment safeguards required by Miranda, violated Mr. Spence's rights and requires that his conviction be reversed.

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[7] Undersigned counsel continues to investigate and develop this challenge. This Court should note the prosecution's bad faith in this case, as demonstrated by its extraordinary concealment of exculpatory evidence as detailed elsewhere in this Petition, as strong support for the inference that the "attempted" eavesdropping by Simons, et al., see S.F. (trial) Vol. XIV at 2029, actually did take place and that incriminating evidence was thereby obtained. Undersigned counsel asserts that, when given full discovery of the entire prosecutorial files in this matter, Mr. Spence will be able to prove this claim.

JAIL INMATES SERVED AS AGENTS OF THE STATE IN THEIR INTERROGATIONS OF MR. SPENCE, AND THROUGH THAT QUESTIONING OBTAINED INCRIMINATING EVIDENCE AGAINST HIM.

39. Several inmates of the McLennan County Jail interrogated Mr. Spence while he was imprisoned there.[8] Upon information and belief, law enforcement officers, including District Attorney Vic Feazell, Assistant District Attorney Ned Butler, and Deputy Truman Simons, directed this interrogation and thereby obtained incriminating evidence against Mr. Spence.[9] None of the inmates employed as State agents to interrogate Mr. Spence ever informed him of any of his rights under Miranda v. Arizona, 384 U.S. 436 (1966), before questioning him concerning the "Lake Waco Murders." The prosecution's use of evidence obtained through these inmates' interrogations of Mr. Spence, conducted in the absence of the Fifth Amendment safeguards required by Miranda, violated Mr. Spence's federal constitutional rights and requires that his conviction be reversed.

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[8] For purposes of this claim, the term "inmates of the McLennan County Jail" includes those prisoners from units of the Texas Department of Corrections (now Texas Dept. of Criminal Justice, Institutional Division) who were brought to McLennan County to assist the State in its capital murder prosecution of Mr. Spence, and who thus resided for periods of time in the McLennan County Jail.

[9] Undersigned counsel continues to investigate and develop this challenge. This Court should note the prosecution's extraordinary bad faith in this case, as demonstrated by its extensive concealment of exculpatory evidence as detailed elsewhere in this Petition. The State's behavior constitutes strong support for the inference that Simons, et al., were instructing their inmate-agents to obtain incriminating evidence from Mr. Spence, and were directing the course of the inmate-agents' interrogation. Undersigned counsel asserts that, when given full discovery of the entire prosecutorial files in this matter, Mr. Spence will prove this claim.

THE STATUTE UNDER WHICH MR. SPENCE WAS SENTENCED, FORMER V.A.C.C.P. ART. 37.071, IMPROPERLY PRECLUDED THE JURY FROM CONSIDERING HIS EVIDENCE IN SUPPORT OF A LIFE SENTENCE.

40. Under the Eighth and Fourteenth Amendments, a capital sentencing jury "must be able to consider and give effect to any mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime." Blystone v. Pennsylvania, ___ U.S.___, 108 L.Ed.2d 255, 263 (1990); Penry v. Lynaugh, 492 U.S. 302, ___ (1989). The charge must allow the jury to: (1) consider "any aspect of the defendant's character or any circumstances of his offense as an independently mitigating factor" and (2) give effect to such evidence "by declining to impose the death penalty." Id., quoting Lockett v. Ohio, 438 U.S. 586, 607 (1978).

41. Mr. Spence's jury saw and heard mitigating evidence which called into question the appropriateness of a death sentence for his offense. See infra. Yet, because of the straightjacket of the Texas capital sentencing statute, the jury had no opportunity to impose a life sentence based on Mr. Spence's mitigating evidence. This preclusive effect violated the Eighth and Fourteenth Amendments, and requires that Mr. Spence's death sentence be reversed. To fully appreciate the scope of the constitutional violation in Mr. Spence's case, a brief review of the history of challenges to the Texas capital sentencing statute, and of the evidence heard and seen by Mr. Spence's jury at his trial, is necessary.

The unconstitutionally preclusive effect of the Texas capital sentencing statute: the Franklin/Penry problem.

42. In Jurek v. Texas, 428 U.S. 262 (1976), the United States Supreme Court upheld the Texas capital sentencing special issues against a facial Eighth Amendment attack. The Supreme Court recognized that the constitutionality of the Texas capital sentencing scheme "turns on whether the enumerated questions allow consideration of particularized mitigating factors." Id. at 272. The Jurek Court therefore predicated its holding on the fact that the Texas special issues "authoriz[e] the defense to bring before the jury whatever mitigating circumstances relating to the individual can be adduced." Id. at 276.

43. Two years later, in Lockett v. Ohio, 438 U.S. 586, 604 (1978), the Supreme Court held that the Eighth and Fourteenth Amendments demand that a capital sentencer "not be precluded from considering as a mitigating factor any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." As the Court explained, the sentencer in a capital case may not be prevented "from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in support of a sentence less than death." Id. [10]

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[10] In Lockett, the Court expressly reaffirmed its holding in Jurek that the Texas statute was not unconstitutional, noting that "[t]he statute survived the petitioner's Eighth and Fourteenth Amendment attack because three Justices concluded that (continued...)

44. The Supreme Court reaffirmed Lockett in Eddings v. Oklahoma, 455 U.S. 104, 113-114 (1982): "Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence."

45. In 1989, the Supreme Court applied the reasoning of Lockett and Eddings to the Texas capital punishment sentencing scheme. After discussing the Texas statute and the conditional acceptance of that system in Jurek, the Court stated that "it is not simply enough to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence." Penry, 492 U.S. at ___, 106 L.Ed.2d at 278; see also Franklin, 487 U.S. 164.

46. In Penry and Franklin, the Court indicated that certain types of constitutionally protected mitigating evidence could not be fully considered and given weight by a Texas jury limited to answering the "special issues" submitted under old Art. 37.071, the statute under which Mr. Spence was sentenced. The Court indicated that the unadorned "special issue" scheme was unconstitutional as applied in at least two circumstances:

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[10](...continued)
the Texas Court of Criminal Appeals had broadly interpreted the second question -- despite its facial narrowness -- so as to permit the sentencer to consider "whatever 'mitigating circumstances' the defendant might be able to show." Lockett, 438 U.S. at 991 (1978).

(1) where the mitigating evidence had "relevance to the defendant's moral culpability beyond the scope of the special verdict questions," Penry, 492 U.S. at ___, 106 L.Ed.2d at 280; or (2) where the mitigating evidence was, in fact, "irrelevant" to the special issues (that is, it had no probative value in answering the special issue questions, whether affirmatively or negatively). Penry, 492 U.S. at ___, 106 L.Ed.2d at 302 (Scalia, J. dissenting); Franklin, 487 U.S. at ___, 101 L.Ed.2d at 173; See also Hitchcock v. Dugger, 481 U.S. 393 (1987).

47. In Penry, the Supreme Court reversed the death sentence of a Texas prisoner who proffered mitigating evidence of mental retardation and a history of child abuse. Noting that the Eighth Amendment demands that a capital sentencing jury be permitted to make a reasoned moral response to mitigating evidence, the Court held that the questions submitted under former V.A.C.C.P. 37.071 precluded such consideration:

> [I]n the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background, we conclude that the jury was not provided with a vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision.

492 U.S. at ___, 106 L.Ed.2d at 284.

48. With respect to the first special issue question, the Court held that "[p]ersonal culpability is not solely a function of a defendant's capacity to act 'deliberately.'" Id. at 280. In other words, Penry's child abuse and mental retardation could not be fully considered under the first question because such evidence had relevance to his moral culpability beyond its

probativeness of whether he had acted "deliberately." As the Court explained:

> In the absence of jury instructions defining 'deliberately' in a way that would clearly direct the jury to consider fully Penry's mitigating evidence as it bears on his personal culpability, we cannot be sure that the jury was able to give effect to the mitigating evidence of Penry's mental retardation and history of abuse in answering the first special issue. Without such a special instruction, a juror who believed that Penry's retardation and background diminished his moral culpability and made imposition of the death penalty unwarranted would be unable to give effect to that conclusion if the juror also believed that Penry committed the crime 'deliberately.'

Id.

49. The Court further found that the second special issue question (the "future dangerousness" inquiry) failed to provide the jury an adequate vehicle to consider the mitigating aspects of Penry's evidence. First, the Court acknowledged that Penry's sentencing phase evidence was relevant to the jury's inquiry regarding future dangerousness. Id. at 281. The Court recognized, however, that Penry's evidence had both aggravating and mitigating qualities, and thus operated as "a two-edged sword," because it "diminish[ed] his blameworthiness for his crime, even as it indicate[d] that there is a probability that he will be dangerous in the future." Id.

50. Absent clarifying instructions or definitions of the special issue terms, the jury could only consider the aggravating edge of Penry's evidence, which compelled a "yes" answer to the question of future dangerousness. As a result, the second

special issue violated the Eighth Amendment since it "'did not allow the jury to consider a major thrust of Penry's evidence as mitigating evidence.'" Id. at 281-282 (emphasis in original), (quoting Penry v. Lynaugh, 832 F.2d 915, 925 (5th Cir. 1987)).

51. Penry analyzed the constitutional defects of the former Texas sentencing scheme when mitigating evidence was presented that was relevant to the statutorily mandated questions, but which had independent relevance to the defendant's moral culpability. Additionally, in Penry, the Supreme Court expressly adopted the reasoning of the Franklin concurrence, which described the defect in the Texas sentencing scheme when mitigating evidence was presented that bore no relevance to the special issue questions.

52. In Franklin, Justice O'Connor concurred in the holding that Franklin's bare stipulation of a clean prison disciplinary record was relevant to his character only as it reflected upon his potential future dangerousness and nothing more. Id. 101 L.Ed.2d 172. Accordingly, she concluded that the mitigating qualities of this evidence could be fully considered under the second special issue.

53. Justice O'Connor's reasoning in Franklin, however, compelled the conclusion that former Art. 37.071 would be constitutionally infirm in cases in which mitigating evidence was presented which was not relevant to the special issues.

> If, however, petitioner had introduced mitigating evidence about his background or character or circumstances of the crime that was not relevant to the special verdict

> questions,... the jury instructions would have provided the jury with no vehicle for expressing its 'reasoned moral response' to that evidence.

Id. at 173 (emphasis added).

54. The concurrence then offered examples of types of mitigating evidence which were irrelevant to the jury's inquiry under the old Texas sentencing scheme: "voluntary service, kindness to others, or of religious devotion might demonstrate positive character traits that might mitigate against the death penalty." Id.

55. Following Penry and Franklin, the Texas Court of Criminal Appeals has restated and applied the Penry/Franklin rule in Gribble v. State, ___ S.W.2d ____, No. 70,773 (Tex. Crim. App. Nov. 14, 1990). As explained by the Texas Court of Criminal Appeals:

> The Texas capital sentencing scheme does not invariably operate in such a way as to violate the Eighth Amendment. Franklin v. Lynaugh, 487 U.S. ___ (1988); Jurek v. Texas, 428 U.S. 262 (1976).
>
> But, at least whenever a capital defendant produces evidence of his own character, background or circumstances surrounding his offense which, according to contemporary social standards, has a tendency to reduce his moral culpability in a way not exclusively related to the deliberateness of his criminal conduct, the provocative behavior of his victim, or the probability of his future dangerousness, the United States Constitution forbids imposition of the death penalty upon him by a sentencer given no means to prescribe, based on such mitigating evidence, a less severe punishment. Penry v. Lynaugh, 492 U.S. ___ (1989).

Id., slip op. at 17. Under Gribble, a capital defendant must be resentenced if his evidence comprises factors that are "regarded,

according to some contemporary social standards as redeeming personality traits or factors which tend to ameliorate fault." Id.

56. Like Penry, Gribble recognizes that the unadorned special issues do not permit the jury "to mitigate punishment if it finds that a defendant's personal moral culpability was . . . reduced" by his or her mitigating evidence. Id. at 19. Gribble acknowledges that the special issues unconstitutionally deny the jury the opportunity to express its judgment whether the defendant, even though likely to be a continuing threat to society, should receive a life sentence. Id.

57. Mr. Spence's jury saw and heard significant evidence in mitigation of his sentence. Numerous witnesses, from civilian witnesses to his former parole officer, testified to David Spence's relentless thirst for alcohol. Friends testified to David's accounts of his own drinking; see, e.g., S.F. Vol. III (trial) at 401. Others recounted how, when they awoke David in the middle of the night for an unexpected visit, David reflexively began drinking; eventually, after a little sleep, he awoke to drink again in the early hours of the next morning. Id. at 451, 456-458. In fact, almost every civilian witness who testified to contact with David outside a correctional facility described him as drinking alcohol during that contact. Mary Russell, whose daughter had wed David's brother, testified that David's longstanding alcoholism, of which she and her husband were aware, was the source of the emotional and mental torture he

daily endured. S.F. (trial) Vol. X at 1560-1567. David's former parole officer, Gene Deal, likewise admitted that he had heard numerous complaints of "drunkenness" at David's home, and that they caused him concern. S.F. (trial) Vol. XV at 2198.

58. The jury also heard testimony that David suffered from mental/emotional problems exacerbated by his alcoholism and his unhappy relationship with his girlfriend Christy Juhl, which drove him to contemplate suicide. See, e.g., S.F. (trial) Vol. X at 1563. One witness recalled that on the morning Christy left David, he chased after her automobile on foot, sobbing and begging her to come back. S.F. (trial) Vol. IV at 637. Other witnesses who knew David well testified that he was distraught and moody during the summer of 1982, and that he grew increasingly depressed and unhappy as the weeks wore on. See, e.g., S.F. (trial) Vol. III at 496-500. Even the prisoners who were held with David at the McLennan County Jail, and who testified against him at trial, acknowledged his bizarre behavior, ranging from a "split personality" to "rocking back and forth" and pacing, glassy-eyed, to weeping for hours, alone in his cell. S.F. (trial) Vol. VI at 964, 989, 1025. All this evidence could have supported a rational juror's reasonable inference that David Spence suffered from a range of emotional and mental problems, and that they contributed to his self-destructive behavior.

59. Indisputably, all this evidence was constitutionally mitigating. Numerous courts have observed that such evidence has

mitigating qualities relevant to the character of the offender and the circumstances of the offense. See, e.g., Burger v. Kemp, 483 U.S. 776, 813 (1987) ("All this [background of abuse and of drug and alcohol use] is mitigating evidence that could be highly relevant." (citing Eddings v. Oklahoma, 455 U.S. 104, 107 (1982)); Eddings, 455 U.S. at 114 (emotional problems are constitutionally mitigating); Demps v. Dugger, 874 F.2d 1385, 1390 (11th Cir. 1989) ("It is true that a history of drug addition can be considered by juries as nonstatutory mitigating evidence." (citing Hargrave v. Dugger, 832 F.2d 1528, 1534 (11th Cir. 1987)); and Fead v. State, 512 So.2d 176, 179 (Fla. 1987) (jury could have found evidence that the defendant committed crime under the influence of alcohol was mitigating). Moreover, many states require that such evidence be considered as a statutory mitigating factor. See, e.g., Cal. Penal Code Sec. 1903.(d) (West 1988 and Supp. 1989); Fla. Sta. Ann. Sec. 921.141(6) (West Supp. 1989); Ill. Ann. Stat. ch. 38, para. 9-1(c)(2) (Smith-Hurd 1979 and Supp. 1989); La. Code Crim. Proc. Ann. art. 905.5 (West 1986 and Supp. 1989); Md. Ann. Code art. 27, Section 413(c)(iii) (1957 and Supp. 1988) (each statute making impairment of mental faculties at time of offense a statutory mitigating factor that jury must consider at sentencing if evidence presented). Thus, this Court must only inquire whether the former Texas statutory scheme, which even the Texas legislature has finally abandoned in the wake of Penry, permitted the unencumbered consideration of this mitigating evidence.

Penry, Franklin, and Gribble demonstrate that it did not, and that Mr. Spence must be granted relief.

The first special issue precluded the jury from considering and giving effect to Mr. Spence's mitigating evidence.

60. Mr. Spence's mitigating evidence of heavy alcohol abuse and mental and emotional distress could have supported a juror's conclusion that he deserved a life sentence, instead of death. However, that same juror could almost certainly have concluded that Mr. Spence's actions were "deliberate" as that term is comprehended by the Texas statute. Under Texas law, the first special issue only requires the jury to determine whether there existed a "moment of deliberation and the determination on the part of the actor to kill." Cannon v. State, 691 S.W.2d 664, 677 (Tex. Crim. App. 1985). The first special issue thus focused solely on Mr. Spence's mens rea at the time of the offense, nothing more.

61. By focusing only upon the fact of a "moment" of deliberation, the first issue necessarily precluded the jurors from considering the reasons why Mr. Spence acted, whether he acted deliberately or not. Indeed, even if a defendant acts "deliberately," he may be less culpable because of the circumstances which led to that deliberate act. This conclusion is the core of the Penry rationale. Thus, while Mr. Spence's history of marital and relationship unhappiness, reflected in his mental and emotional distress and his enormously self-destructive alcoholism, may have provided some hints at a mitigating

explanation for the offense, this compelling explanation could coexist with the requisite "moment of deliberation," and thus could not be given any effect by a juror limited to answering that issue. Franklin, 487 U.S. at 186. As a result, although a rational juror might conclude that a life sentence would be appropriate for Mr. Spence, she would still be compelled to answer "yes" to the first special issue.

62. Absent a definition of "deliberately," the jury could not consider fully this mitigating evidence as it related to Mr. Spence's personal culpability. In particular, the jury could not give effect to the conclusion that Mr. Spence deserved to be spared on account of his unhappy relationships, the mental and emotional distress they caused him, or his crippling alcoholism, even if he committed the crime "deliberately." Thus, in Mr. Spence's case, the Texas death penalty statute operated to preclude the jury's consideration of his mitigating evidence, in violation of the Eighth and Fourteenth Amendments. Penry, 492 U.S. at ___, 106 L.Ed.2d at 284, 292.

The second special issue precluded the jury from considering and giving effect to Mr. Spence's mitigating evidence.

63. In Penry, the Supreme Court described the serious constitutional flaw of the second special issue.[29] The Court observed that Penry's mitigating evidence acted as a double-edged

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[29] The second special issue under old V.A.C.C.P. Art. 37.071 (now amended to conform to the requirements of the Eighth Amendment) required the jury to determine "whether there [were] a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."

sword; it suggested a "yes" answer to the question of future dangerousness, but justified a life sentence by demonstrating his reduced moral culpability. As the Court explained:

> Penry's mental retardation and history of abuse is thus a two-edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future....The second special issue, therefore, did not provide a vehicle for the jury to give mitigating effect to Penry's evidence of mental retardation and childhood abuse.

Penry, 492 U.S. at ___, 106 L.Ed.2d at 281-282.

64. In precisely the same fashion as Mr. Penry's evidence of childhood abuse and mental retardation, David Spence's evidence of severe alcoholism and mental/emotional distress had mitigating value beyond the scope of the second special issue. If either was relevant to the second special issue, it was relevant only as an aggravating factor, since both Mr. Spence's alcoholism and his mental/emotional distress strongly suggested the possibility that he would be dangerous in the future. This conclusion is bolstered by the fact that the prosecutors instructed jurors throughout voir dire that the most trivial of property offenses (the phrase "criminal mischief" was employed several times) could demonstrate the requisite "continuing threat" to compel an affirmative answer to the second special issue. Given that low threshold of "future dangerousness," the absence of any further curative or definitional instructions concerning the meaning of the terms of the second special issue, and the jurors' awareness of Mr. Spence's alcoholism and its

accompanying destructive affect on his ability to control his behavior, it is plain that Mr. Spence's mitigating evidence of alcoholism and mental/emotional distress was "two-edged sword" evidence, legally indistinguishable from Penry's mental retardation and history of abuse. See also Mayo v. Lynaugh, 893 F.2d 683 (5th Cir.), rhg. den., 920 F.2d 251 (1990); cert. denied, ___ U.S.___ (October 7, 1991) (holding that Penry does not require evidence of any "particular" mitigating circumstance, e.g., mental retardation, to justify relief, but only that the jury have been unable to give effect to the evidence by imposing a life sentence because of the preclusive effect of former V.A.C.C.P. Art. 37.071).

65. Thus, when considering Mr. Spence's mitigating evidence, a rational juror could have concluded that Mr. Spence should live, even if the second special issue should still be answered affirmatively. See Gribble, slip op. at 19 (resentencing required if juror could conclude that defendant should live "even if [he is] likely to be a continuing threat to society"). Limited to answering the special issue questions of old Art. 37.071, however, such a juror could not give effect to this conclusion by returning a life sentence for Mr. Spence.

66. This conclusion is consistent with the observation of the Texas Court of Criminal Appeals in Gribble that "All of these circumstances are widely regarded, according to some contemporary social standards, as . . . factors which tend to ameliorate fault. As such, the sentencer in a capital proceeding must be

authorized to mitigate punishment if it finds that a defendant's personal moral culpability was thereby reduced." Id.

67. Mr. Gribble's jury, however, was instructed only in the bare terms of the special issues -- like Mr. Penry's jury and Mr. Spence's jury. Like Mr. Gribble's jury, Mr. Spence's jury thus had no "opportunity to express its judgment whether [Mr. Spence] even if likely to be a continuing threat to society, should receive the death sentence." Id. at 19. Accordingly, like Mr. Gribble, Mr. Spence must be granted relief.

68. A reasonable juror could have concluded that Mr. Spence was less morally culpable and deserving of a life sentence because of his evidence of crippling alcoholism and emotional/mental distress. That juror, without the benefit of further instructions under the second special issue, could give no effect to the mitigating quality of Mr. Spence's evidence, and so would be compelled to find a probability of his future dangerousness. This outcome violated Mr. Spence's rights under the federal constitution and requires that his conviction and sentence be reversed. See Penry.

THE PROSECUTION'S HARASSMENT OF A CRUCIAL DEFENSE WITNESS, WHICH CAUSED HER TO REFUSE TO TESTIFY, DEPRIVED THE PETITIONER OF THE FUNDAMENTAL RIGHT TO PRESENT A DEFENSE.

69. Mr. Spence was precluded from presenting and having the jury consider exculpatory testimony from a crucial defense witness, Catherine Breiten, in violation of Mr. Spence's fundamental due process rights guaranteed under the Constitution. Specifically, the prosecution harassed and intimidated the

witness, forcing her off the stand and into a refusal to testify. In the circumstances of Mr. Spence's prosecution, such coercion -- committed by the State and condoned by the trial court -- infringed his right to have compulsory process for obtaining witnesses in his favor and to present a defense.

70. During its case-in-chief, the defense offered the testimony of Catherine Breiten in support of its theory that the offense was committed by someone other than Mr. Spence. The trial court granted the State's motion in limine to exclude this proffered testimony. Prior to the offer of Ms. Breiten's testimony, a full hearing on the question of the admissibility of her testimony was conducted outside the presence of the jury, in which Ms. Breiten testified.

71. Catherine Breiten testified that her stepson Ronnie Breiten arrived at her house at approximately 6:30 a.m. on the morning following the murders wanting to wash his clothes. S.F. (trial) Vol. X at 1579-1580; 1588. She told the court that she was doing a load of "whites," and that she was angry when Ronnie put his dirty clothes and a pair of tennis shoes into the washer. She stated that she noticed there was blood and dirt on Ronnie's clothes and shoes. S.F. (trial) Vol. X at 1580. Ms. Breiten testified that Ronnie told her that the night before he had been "fishing and drinking" at Lake Waco, the scene of the murders. S.F. (trial) Vol. X at 1580. In addition, he asked to borrow his father's knife, claiming to have lost his own knife the night before. S.F. (trial) Vol. X at 1581. She confirmed that Ronnie

was the husband of Joyce Breiten, who had cashed two of the victims' paychecks for them hours before their deaths. S.F. (trial) Vol. X at 1582.

72. On cross-examination, the State repeatedly implied that Ms. Breiten had an improper sexual relationship with her stepson, Ronnie. S.F. (trial) Vol. X at 1595. The witness was confronted with this insinuation repeatedly throughout the cross-examination. After expressing rage and disgust over the prosecutor's insistence that she admit a sexual relationship with Ronnie, Ms. Breiten refused to answer further questions. S.F. (trial) Vol. X at 1599. The defense objected and the State failed to state a good faith reason for the line of questioning. S.F. (trial) Vol. X at 1599-1602. Throughout the discussion between the trial court and counsel, Ms. Breiten continued to refuse to answer additional questions. When the court declined to rein in the prosecutor, he pressed onward in his inquiry. Finally, Ms. Breiten became hysterical, told the court that she was very upset and angry, and that she couldn't talk at that moment because she was on the verge of tears. S.F. (trial) Vol. X at 1602. The trial court advised her to obtain the assistance of an attorney and adjourned the hearing for the day, ordering all counsel not to communicate with Ms. Breiten or her attorney before the resumption of her testimony. S.F. (trial) Vol. X at 1603-1606.

73. When the hearing resumed the following morning, Ms. Breiten again refused to testify. She disavowed her entire

testimony from the previous day and claimed that she had lied to get her stepson in trouble. S.F. (trial) Vol. X at 1694-1695. On re-direct examination, defense counsel established that Ms. Breiten had told her story to a number of people during the two years after the murder and prior to trial. S.F. (trial) Vol. X at 1697-1701.

74. Clearly, but for the purposeful intimidation on the part of the State, this crucial witness for the defense would have continued to testify on behalf of Mr. Spence. The prosecutor, in accusing the witness of having an affair with her stepson, forced her off the stand. The State knowingly provoked Ms. Breiten with irrelevant questions and groundless insinuation until she was consumed with anger and visibly upset. The prosecutor continued to insult and badger her until she was overwhelmed with emotion and unable to finish her testimony. At that point, she repeatedly expressed her unwillingness to continue due to the explicitly irrelevant and personally insulting nature of the questions, until the court finally interrupted the line of questions. In short, the State's misconduct, condoned by the trial court, violated Mr. Spence's constitutional right to present witnesses in his defense by harassing a crucial witness so that the witness refused to testify.

75. "Few rights are more fundamental than the right to present a defense." Chambers v. Mississippi, 410 U.S. 284, 302 (1973). The Sixth Amendment right of an accused to have

compulsory process for obtaining witnesses in his favor is so fundamental and essential to a fair trial that it is incorporated into the due process clause of the Fourteenth Amendment so as to be applicable in state court.

> Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington v. Texas, 388 U.S. 14, 19 (1967). Cases have held that various types of governmental interference can deprive the defendant of this right. See, e.g., Webb v. Texas, 409 U.S. 95 (1972) (defense witness intimidated by remarks of trial judge); United States v. Hendricksen, 564 F.2d 197 (5th Cir. 1977) (defense witness intimidated by terms of plea bargain); United States v. Morrison, 535 F.2d 223 (3rd Cir. 1976) (defense witness intimidated by remarks by assistant United States attorney); United States v. Thomas, 488 F.2d 334 (6th Cir. 1973) (defense witness intimidated by remarks of secret agent involved in the case).

76. In Webb v. Texas, 409 U.S. 95 (1972), the Supreme Court reversed the Texas Court of Criminal Appeals' affirmance of Webb's conviction, holding that the trial court had violated his constitutional rights by "threatening and harassing the sole witness for his defense, so that the witness refused to testify." Id. at 95. The Court found that Mills, the witness in this case, refused to testify only after the judge's intimidating warning, which according to the Court, "strongly suggests that

the judge's comments were the cause of Mills' refusal to testify." Id. at 97. The Court concluded that the judge's comments "effectively drove that witness off the stand, and thus deprived the petitioner of due process of law under the Fourteenth Amendment." Id. at 98.

77. The facts in Mr. Spence's case mirror the events which transpired in Webb. Ms. Breiten was "effectively driven" off the witness stand by the prosecutors's purposefully intimidating questions directed towards the nature of her relationship with her stepson. His questions were irrelevant to any issue at trial, and served his sole purpose of harassing and intimidating the witness. The trial court permitted this coercive line of questioning over defense counsel's objection. Even after the prosecutor could articulate no fair basis for such questions, the court allowed him to continue this line of questioning. Ms. Breiten refused to testify and the jury never heard any of the evidence connecting a third person to the crime. The prosecutor's misconduct in harassing a crucial defense witness deprived Mr. Spence of his constitutional right to present witnesses in his defense and infringed upon his due process rights under the Fourteenth Amendment. Mr. Spence was found guilty and sentenced to death. This Court must reverse Mr. Spence's conviction in accordance with Webb.

78. A significant number of the lower courts have expressly adopted the reasoning in Webb. The United States Court of Appeals for the Fifth Circuit went even further and adopted a

test for determining whether governmental interference is significant enough to deprive a defendant of his due process right to prepare and present a defense in United States v. Hammond, 598 F.2d 1008 (5th Cir. 1979). The Court held that "substantial government interference with a defense witness' free and unhampered choice to testify violates due process" rights of the defendant. Id. at 1012; cf. United States v. Hendricksen, 564 F.2d 197 (5th Cir. 1977). In Hammond, the Fifth Circuit found that the petitioner's constitutional rights were violated when two defense witnesses refused to testify after one was threatened with "trouble" in a pending state prosecution, and that such an egregious deprivation of due process rights was harmful per se. The Court of Appeals pointed out that it was following the lead of other circuits in agreeing that this type of violation is harmful per se. Specifically:

> On the basis of Webb, both the third and the sixth circuits have stated that they would not require a finding of prejudice in order to reverse a conviction because of this type of due process violation.

Hammond, 598 F.2d at 1013 (citing United States v. Morrison, 535 F.2d 223 (3rd Cir. 1976); United States v. Thomas, 488 F.2d 334 (6th Cir. 1973)). In support of its interpretation of Webb, the Court of Appeals invoked the Supreme Court's ruling in Chapman v. California, 386 U.S. 18 (1967), that there are some constitutional violations which can never be harmless. See also United States v. Goodwin, 625 F.2d 693 (5th Cir. 1980) (government intimidation of defense witness is a violation of due process requiring automatic reversal).

79. In United States v. Morrison, 535 F.2d 223 (3rd Cir. 1976), the Third Circuit found that the defendant was denied a fair trial by the deprivation of his constitutional right to call witnesses in his defense due to the actions of the state's attorney. Morrison, 535 F.2d at 224. The prosecutor repeatedly warned the prospective defense witness against the dangers of perjury and subpoenaed the defense witness into his office with the sole purpose of "impress[ing] Ms. Bell with the force of the law with which she was entangling." Id. at 225-226. The Third Circuit found Webb controlling, and held that although Ms. Bell testified to non-incriminating matters and outside the presence of the jury, these facts were irrelevant to the issue of the prosecutor's interference with the defendant's right to present witnesses in his favor. Id. at 227. The actions by the prosecutor were held to be unnecessary and viewed by the Court as the reason for the witness' refusal to testify.

80. The Court of Appeals also rejected a harmless error analysis in Morrison, holding that the prosecutor deprived the defendant of due process of law under the Fourteenth Amendment:

> Thus where the Government has prevented the defendant's witness from testifying freely before the jury, it cannot be held that the jury would not have believed the testimony or that the error was harmless.

Morrison, 535 F.2d at 228. The Court thus reversed the district court's denial of a new trial based on its examination of the prosecutor's abusive behavior using the framework in Webb.

81. The Sixth Circuit also followed the rule in Webb in holding that intimidation on the part of the government, causing

a prospective defense witness to refuse to testify, severely prejudices a defendant's due process rights and warrants a reversal of conviction. In United States v. Thomas, 488 F.2d 334 (6th Cir. 1973), the Court of Appeals was faced with a state's attorney who instructed a secret service agent involved in the case to admonish the defense witness that he would be prosecuted if he took the stand. The trial court refused to grant a mistrial and the witness refused to testify although the prosecutor advised the trial court that the witness would not be prosecuted. Id. at 335. The Court of Appeals analyzed the issue in terms of Webb, which it found "illuminating." Id. at 336. It determined that the government's actions were intended to intimidate the prospective witness, and "substantially interfered with any unhampered determination that the witness might have made as to whether to testify and if so as to the content of such testimony." Id., at 336. The Court remanded the case for a new trial, stating that nothing could have "restored [the witness'] free and voluntary choice, eliminating the prejudice." Id. at 336.

82. It is clear from the record that Ms. Breiten, the crucial witness for the defense, was driven off the stand by the prosecution's purposeful intimidating remarks, barrage of sexual innuendo, and questions regarding matters irrelevant to the issues at hand. This substantial governmental interference effectively interfered with the witness' free and unhampered decision to testify. This violation of due process rights

severely prejudiced Mr. Spence's ability to present a defense, and therefore warrants a reversal of his conviction.

THE COURT ERRED IN ADMITTING PSYCHIATRIC TESTIMONY AGAINST MR. SPENCE AT THE PUNISHMENT PHASE OF TRIAL.

83. Dr. James Joliff, a psychiatrist in the pay of the prosecution, interrogated Mr. Spence while he was imprisoned at the McLennan County Jail, after Mr. Spence had requested a therapeutic interview with a psychiatrist. Before interrogating Mr. Spence, Joliff failed to warn him that he had the right to have counsel present and the right to terminate the interview at any time. S.F. (trial) Vol. XIV at 2033; see Miranda v. Arizona, 384 U.S. 436 (1966). Nor did Joliff notify Mr. Spence's attorney of record that he was interrogating Mr. Spence with respect to the question of his "future dangerousness," with an eye toward testifying at trial. Based on his interview with Mr. Spence, Joliff later testified to his expert opinion that Mr. Spence would unquestionably be a "continuing threat to society." Joliff was permitted to testify at the punishment phase of trial despite the fact that the State intentionally concealed him as a witness by withholding his name from the witness list provided to defense counsel. These actions by Dr. Joliff and the prosecutors in Mr. Spence's case flatly violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution, and his rights under the Constitution of the State of Texas. Mr. Spence's death sentence cannot stand.

84. The Sixth Amendment is violated when a state psychiatrist examines a defendant on the issue of future dangerousness, without the defendant's being permitted the assistance of defense counsel, and then offers evidence based on that examination at the penalty phase of trial. The Fifth Amendment is violated when a state psychiatrist does not give adequate warning to such a defendant, in advance of the examination, to protect his guarantee against self-incrimination. Powell v. Texas, 492 U.S. ___, 106 L.Ed.2d 551 (1989); Satterwhite v. Texas, 486 U.S. 249 (1988); Buchanan v. Kentucky, 483 U.S. 402 (1987); Estelle v. Smith, 451 U.S. 454 (1981); Miranda v. Arizona, 384 U.S. 436 (1966). The Fourteenth Amendment is violated when the State, through misrepresentation and trickery, deprives the defense of a fair opportunity to confront and contest its evidence at trial.

85. Accordingly, when the State conceals from a person in custody that a psychiatric examination will encompass the issue of future dangerousness, and that the psychiatrist will testify for the State against the defendant at the penalty phase of his capital trial, any claim that the defendant voluntarily and knowingly "waived" his and Sixth Amendment rights is illusory. In addition, when a State agent fails to inform a defendant undergoing custodial interrogation that he has a panoply of rights he may exercise to protect him against State coercion, any claim that defendant's statement is "voluntary" is unfounded. Finally, when the State hides the name of a critically important

witness in order to "ambush" the defense at the punishment phase of trial, the Fourteenth Amendment's guarantees are abridged.

86. While a prisoner at the McLennan County jail and the prime suspect in the unsolved "Lake Waco Murders," Mr. Spence had mentioned several times to Deputy Sheriff Truman Simons, with whom he talked regularly, that he wondered whether he had a "split personality." S.F. (trial) Vol. XIV at 2031. Mr. Simons told Mr. Spence that he needed professional help, and encouraged Mr. Spence to seek a psychiatric examination. Id. Once Mr. Spence agreed, District Attorney Vic Feazell, eager to help, arranged for Mr. Spence to be examined by Dr. Joliff, ostensibly to determine whether Mr. Spence had a "split personality." Id. The State's real purpose in coaxing Mr. Spence to submit to Dr. Joliff's interrogation became clear at the sentencing phase of Mr. Spence's trial, when Dr. Joliff testified that Mr. Spence would unquestionably be dangerous in the future. Id. at 2268.

87. Deputy Simons has testified under oath that he affirmatively misled Mr. Spence about the actual scope of the psychiatric examination before Mr. Spence consented to submit:

> Q. Did you specifically warn [Mr. Spence] that any statements he made to Dr. Joliff may be used in Dr. Joliff forming a conclusion in coming in and testifying in the punishment phase of the capital murder trial?
>
> A Well, I didn't know for sure what he and Dr. Joliff were going to talk about.
>
> Q Did you warn him about that specifically?
>
> A No, sir, not about the -- just the specifics of, **if you go in there and tell him about the**

lake case, it will be used against you, no, sir, I didn't do that.

Q It was your understanding that was not the purpose of Dr. Joliff going in and talking with him to begin with?

A **My understanding was that it was just going to be for evaluation purposes,** to see what David's mental frame of mind was at that particular time.

Q Specifically with regard to the question of whether or not he had what we call split personality?

A Yes, sir.

State of Texas v. David Wayne Spence, No.15,976 (85th District Court, Brazos County, Texas), S.F. (trial) Vol. XXIII at 5812. Deputy Simons admitted he urged Mr. Spence to request a psychiatric examination, then (after the district attorney had arranged the interrogation) failed properly to caution Mr. Spence that the examination would be used against him at the punishment phase of his capital trial.

88. In the context of these assurances from the deputy who had befriended him and facilitated his request for help, Mr. Spence's assent to the fatal interview even after the constitutionally inadequate "warnings" from Dr. Joliff is understandable. The only person Mr. Spence trusted, Deputy Simons, had told him that the interview was just to determine whether he had a "split personality," exactly as Mr. Spence had requested. Given the basis of his request and the promises of Deputy Simons, the only **possible** interpretation Mr. Spence could have given the doctor's subsequent "warning" was that if the

psychiatrist found that Mr. Spence did not have a "split personality," he might testify to that fact at some future proceeding. Such intentionally misleading "warnings," crafted to conceal the true purpose of the psychiatric interview and the actual peril the defendant faces if he submits, do not come close to satisfying the Fifth and Sixth Amendment guarantees of Estelle v. Smith and its progeny. On the contrary, the State's concerted machinations to mislead a possibly mentally ill prisoner into becoming the instrument of his own execution "shocks the conscience" and violates every basic notion of due process. See Rochin v. California, 342 U.S. 165 (1952); Schmerber v. California, 384 U.S. 757 (1966).

89. A capital defendant faced with the prospect of an examination by the State's psychiatrist has two distinct constitutional protections which the State must honor. First, he has the right under the Fifth Amendment not to cooperate with the State's psychiatrist, whose examination is intended to help the State secure his execution. See Estelle v. Smith, 451 U.S. at 461-469. Because he is being interrogated by a State agent and his answers may subject him to incrimination or punishment, a capital defendant must be warned of all the consequences and of all the rights of which he may avail himself, and then elect knowingly to waive his right not to participate in the interview, and his right to consult an attorney, before the State's psychiatrist may testify concerning future dangerousness based on

statements by the defendant. Id. at 469 (quoting Miranda v. Arizona, 384 U.S. 436, 478 (1966)).

90. Second, a capital defendant threatened with interrogation by a State psychiatrist has the right under the Sixth Amendment to the assistance of counsel in deciding whether to submit to questioning. Estelle v. Smith, 451 U.S. at 469. As the Supreme Court has explained,

> It is central to [the Sixth Amendment] principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State **at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial.**

United States v. Wade, 388 U.S. 218, 226-227 (1967) (footnote omitted) (emphasis added). See also United States v. Henry, 447 U.S. 264 (1980); Massiah v. United States, 377 U.S. 210 (1964). This is especially true for a defendant facing trial for a capital crime, for whom

> the decision whether to submit to a psychiatric examination designed to determine his future dangerousness is "literally a life or death matter" which [he] should not be required to face without "the guiding hand of counsel."

Smith, 451 U.S. at 471 (citations omitted). Mr. Spence's case illustrates perfectly why the assistance of counsel, cognizant of the actual scope of the examination, is necessary to protect the accused's constitutional rights. In the absence of an attorney, trickery of the sort engaged in by the overzealous prosecutor in Mr. Spence's case is difficult to prevent; only the shield of

counsel can deter the State from misconduct and vindicate the constitutional rights of the accused.

91. At trial, Dr. Joliff freely admitted that his opinion, that Mr. Spence was an "antisocial personality," "extremely dangerous" and likely to "continue to be dangerous all his life," was based on his lengthy examination of Mr. Spence. S.F. (trial) Vol. XIV at 2263, 2264-2268. Thus, it is apparent that Dr. Joliff's examination of Mr. Spence was the basis for his ultimate damning opinion that Mr. Spence would be dangerous in the future. See Powell, 492 U.S. at ___, 106 L.Ed.2d at 554. The prosecution emphasized Dr. Joliff's testimony as the basis of its case at punishment. S.F. (trial) Vol. XIV at 2299-2305, 2343-2356.

92. This mischief was made possible by the State's not affording Mr. Spence adequate warnings or the assistance of counsel. The prosecutor saw Mr. Spence's guileless request for a psychiatric interview on one subject (his "split personality") as a golden opportunity to lay a trap for him on another (his future dangerousness) without the interference of defense counsel. This inexcusable misconduct violated Mr. Spence's rights under the Sixth Amendment. The conspiracy to conceal the true nature of the psychiatric interview from Mr. Spence, as a result of which the "warnings" he received were incomplete, misleading, and inaccurate, likewise abridged his rights under the Fifth Amendment since it rendered his "waiver" wholly unknowing, unintelligent, and involuntary. See Johnson v. Zerbst, 304 U.S. 458 (1938). Mr. Spence's death sentence must be reversed.

THE JURY CHARGE AT THE GUILT PHASE RELIEVED THE PROSECUTION OF ITS OBLIGATION TO PROVE EVERY ELEMENT OF THE CRIME BEYOND A REASONABLE DOUBT.

93. Mr. Spence was charged with capital murder under the provisions of Tex. Pen. Code §19.03(a)(2). To be found guilty of capital murder under §19.03(a)(2), an accused must specifically have intended to kill his victim. Gardner v. State, 730 S.W.2d 675, 687 (Tex. Crim. App. 1987).

94. The jury charge in Mr. Spence's case, however, did not require the jury to find specific intent to kill. Instead, the jury charge provided: "A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result." See Charge of the Court (guilt-innocence phase) (emphasis supplied). Based upon this definition of intent, the jury was charged that a person commits capital murder when he intentionally causes the death of another while in the course of committing or attempting to commit the offense of aggravated kidnapping. Id.

95. Under the Court's instructions, therefore, Mr. Spence could have been convicted of capital murder (i.e., the jury found that he intentionally caused the death of Jill Montgomery) based solely on a finding that he intentionally engaged in the conduct that caused her death -- that is, that he intentionally stabbed her with an unknown sharp object. The jury was not required by this charge to find that Mr. Spence specifically intended to cause her death.

96. This theory of conviction was unconstitutional, however, because it relieved the prosecution of proving beyond a reasonable doubt that Mr. Spence had possessed specific intent to kill, an element of capital murder. Gardner v. State, supra. This charge thus deprived Mr. Spence of due process of law. In Re Winship, 397 U.S. 358 (1970). "[W]hen a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside." Leary v. United States, 395 U.S. 6, 31-32 (1969). Mr. Spence's conviction and death sentence were obtained in violation of the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Article I, §§ 10, 13, and 19 of the Texas Constitution, and must be reversed.

THE TRIAL COURT'S CHARGE ON PUNISHMENT FAILED TO INSTRUCT THE JURY TO CONSIDER MITIGATING EVIDENCE IN DETERMINING THE APPROPRIATE PUNISHMENT.

97. The trial court, in its punishment phase instructions, never informed the jury that they were required by law to consider mitigating evidence presented in the case in carrying out their duties during the sentencing phase of the trial. Although the court instructed the jury to consider all the evidence from both portions of the trial, the word "mitigating" was never explained in the Court's instructions.

98. This instruction is directly contrary to established federal law in this Circuit. In Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981), the Fifth Circuit Court of Appeals held that it was unconstitutional for the trial court to fail to instruct the

jury to consider mitigating evidence in reaching their sentencing phase decision in a capital case. The Court held that in such a case the jury is not given sufficient guidance, and thus their discretion is not sufficiently channeled as required by the Eighth Amendment, in the absence of such instruction. See Gregg v. Georgia, 428 U.S. 153 (1972).

99. In this case, the word "mitigating" was not defined or explained in the instruction and the jury was given no guidance as to how they should consider the evidence that was presented during the trial and punishment phase that might mitigate Mr. Spence's moral culpability. The jury was never instructed how to consider anything on behalf of the defendant before reaching its sentencing decision. The instruction therefore violates Mr. Spence's right to an individualized determination of sentence, under the Eighth and Fourteenth Amendments and similar provisions of Texas law.

THE STATUTE UNDER WHICH MR. SPENCE WAS SENTENCED FORBADE A SINGLE JUROR TO GIVE MITIGATING EFFECT TO HIS DESIRE TO RETURN A LIFE SENTENCE, BY REQUIRING TEN VOTES TO RETURN A FINDING OF A MITIGATING CIRCUMSTANCE.

100. The trial court gave the following instruction to the jury in this case:

> If ten jurors or more vote "No" as to any Special Issue, then the answer of the Jury shall be "No" to that issue....

S.F. Vol. V at 918 (punishment phase charge to the jury).

101. Tex. Code Crim. Proc. Art. 37.071 (2)(e) was amended by Acts 1981, 67th leg., p. 2637, ch 275, p.1. This amendment

went into effect August 31, 1981, more than three years before Mr. Spence was tried. The amendment precluded the imposition of a death sentence if even a single "no" vote were cast, and required, in such a case, the automatic imposition of a life sentence. Contrary to this amendment, the instruction given in this case created a need for a ten person majority before the jury could return a finding of a mitigating circumstance by answering any special issue "no".

102. Under the Eighth Amendment, each juror must be allowed to consider and give effect to her conclusion that the evidence does not warrant a sentence of death. Mills v. Maryland, 486 U.S. 367, (1988). McKoy v. North Carolina, ___ U.S. ___ (1990). When even a single juror wishes to voice her claim that the evidence does not support a sentence of death, the Eighth Amendment requires the court to listen. In this case, as in Mills, the instructions required the agreement of ten jurors before Mr. Spence could be given a life sentence. By instructing the jury that ten votes were required before a dissenting juror could register her convictions, the instructions effectively removed that juror from the case.

103. At best, the instructions in this case informed the juror that by continuing to vote her conscience she would force the entire case to be retried; at worst, the instructions forced her to conclude her view of the evidence was irrelevant unless she persuaded nine other jurors. Jurors in the majority were not only free to pressure any dissenter with these arguments, but

were encouraged to do so by the instructions and by the arguments of counsel for the State. This impermissibly denied Mr. Spence a fair sentencing phase and an individualized determination of sentence as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and similar provisions of Texas law. Mr. Spence's sentence of death must be reversed.

THE STATUTE UNDER WHICH MR. SPENCE WAS SENTENCED VIOLATES FURMAN V. GEORGIA BECAUSE THE STATE COURTS' INTERPRETATION AND APPLICATION OF ITS AGGRAVATING CIRCUMSTANCES RESULTS IN THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY.

104. The jury that sentenced David Wayne Spence to die was deprived of instructions concerning the meaning of dispositive terms in the special issue questions. The trial court refused such instructions when they were requested by defense counsel. See S.F. Vol. XV at 2282. The failure to define the operative terms violated the constitutional requirement that each statutory aggravating circumstance genuinely narrow the class of persons eligible for the death penalty and reasonable justify the imposition of a more severe penalty. Godfrey v. Georgia, 466 U.S. 420 (1980). Because of the court's refusal to charge the jury in a rationally reviewable manner, no rational process justified the imposition of a death sentence upon Mr. Spence in comparison to those cases in which a life sentence has been imposed. This failure to properly instruct the jury violated Mr. Spence's rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

105. The Texas special issues, as written, as applied in Mr. Spence's case, and as interpreted by the Court of Criminal Appeals, function as aggravating circumstances. An aggravating circumstance is any finding by a capital sentencer that "circumscribe[s] the class of persons eligible for the death penalty." Zant v. Stephens, 462 U.S. 862, 878 (1983). Since an affirmative finding to each special issue is an absolute requirement before a death sentence may be imposed, see Tex. Code Crim. Proc. Art. 37.071, each functions as an aggravating circumstance as defined by the Supreme Court in Zant v. Stephens.

106. When an aggravating circumstance is vague, it cannot serve its constitutionally mandated narrowing function. A sentence of death may not be imposed by a jury relying on such a vague aggravating factor unless the state court cures such vagueness by applying a valid limiting construction, thereby providing the sentencer specific and detailed guidance concerning its scope. Maynard v. Cartwright, 486 U.S. 356 (1988); Godfrey v. Georgia, 446 U.S. 420, 428 (1980). See Profitt v. Florida, 428 U.S. 242, 253 (1976).

107. Because the Texas special issues contain terms which facially are unconstitutionally vague, and to which neither the sentencing jury nor the reviewing court applies any limiting construction, the special issues are unconstitutional as applied to Mr. Spence. Mr. Spence's death sentence must therefore be reversed. See Walton v. Arizona, 497 U.S.___, 111 L.Ed.2d 511

(1990) and Lewis v. Jeffers, 497 U.S. ___, 111 L.Ed.2d 606 (1990).

108. Choosing those who may be sentenced to death entails two processes: (1) the narrowing of a class of those eligible for the death penalty; and (2) a selection from that class of those who shall be sentenced to death. Zant v. Stephens, 462 U.S. at 876-879. Aggravating circumstances perform the first of these functions by narrowing the class of death-eligible defendants. "[A]t the stage of legislative definition [an aggravating circumstance] circumscribe[s] the class of persons eligible for the death penalty." Id. at 878. The sentencer's consideration in a separate sentencing trial of mitigating factors about the character and background of the defendant performs the second function.

109. The manner in which a state statute narrows the class of death-eligible persons under the first process is purely a matter of state law. Lowenfield v. Phelps, 484 U.S. 231, 246 (1988) (state legislature defines the narrowing function performed by its capital sentencing statute); Zant v. Stephens, 462 U.S. at 878. In Texas, the Court of Criminal Appeals has held that the special issues provide this narrow function and are therefore aggravating circumstances under the Constitution:

> [T]he function of Article 37.071 [is] to further narrow the class of death-eligible offenders to less than all those who have been found guilty of [capital murder] as defined under §19.03 [Texas' capital murder statute]

Smith v. State, 779 S.W.2d 417, 420 (Tex. Crim. App. 1989); Roney v. State, 632 S.W.2d 598, 603 (Tex. Crim. App. 1982) (facts of crime themselves do not provide death-eligibility; otherwise, every capital murder in the course of a robbery would warrant death and destroy the purpose of punishment stage in Texas capital cases, which is to provide reasonable and controlled decision concerning imposition of death penalty and to prevent capricious and arbitrary imposition of sanction).

110. However, the mere articulation of aggravating circumstances will not suffice as a framework for the imposition of the death penalty if the circumstance contains terms which are inherently vague and standardless. In such a case, it is imperative that the state apply a limiting construction. As the Supreme Court reaffirmed in Walton v. Arizona:

> When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face.

Id, 111 L.Ed.2d at 528. The Court emphasized the same principle in Lewis v. Jeffers:

> Our decision in Walton thus makes clear that if a State has adopted a constitutionally narrow construction of a facially vague aggravating circumstance, and if the State [court] has applied that construction to the facts of the particular case, then the "fundamental constitutional requirement" of "channeling and limiting ... the sentencer's discretion in imposing the death penalty," Cartwright, 486 U.S. at 362, has been satisfied.

Id., 111 L.Ed.2d at 622.

111. The flaw in the Texas statute is that, unlike Arizona or Georgia, but precisely as in Oklahoma, the Texas Court has refused to apply a limiting construction to the unconstitutionally vague terms in the special issues. Moreover, the jury that determines the sentence is by law not allowed to be given any guidance in interpreting otherwise impermissibly broad and vague special issue terms.[30] This flaw means that Texas' scheme, like that in Oklahoma, is unconstitutionally vague and standardless.

112. Mr. Spence's case is unlike Stephens, supra, in which the Supreme Court upheld the Georgia scheme despite the invalidation of one of the aggravating factors. In that case, the Georgia Supreme Court had ruled the aggravating factor concerning the defendant's record of prior "assaultive" conduct to be unconstitutionally vague, but nevertheless upheld the sentence. The Supreme Court held the statutory aggravating factor was vague; however, under Georgia law, the information

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[30] In Walton and Jeffers, the Supreme Court held that Arizona's aggravating circumstances, though facially vague, were not unconstitutional because the state had adopted and applied a valid limiting construction. Specifically, the Supreme Court upheld the constitutionality of the construction given by the Arizona Supreme Court to the "cruelty" aspect of the aggravating circumstance of "especially heinous, atrocious or cruel." The trial court (which is the sentencer in Arizona capital cases) was presumed to apply the limiting instruction set forth by the Arizona Supreme Court that "a murder is committed in an especially cruel manner when 'the perpetrator inflicts mental anguish or physical abuse before the victim's death...'" Lewis v. Jeffers, 111 L.Ed.2d. at 615-616. The Court had defined the term "mental anguish" as well.

about prior "assaultive" conduct had been appropriately considered by the jury as "nonstatutory" aggravating information which the jury could take into account in its sentencing deliberations. The Georgia jury was instructed to determine the sentence based on a consideration of all mitigating factors and both the statutory and non-statutory aggravating information presented by the state.

113. In Texas, by contrast, the special issues are the only vehicle by which the jury may assess aggravating information. There is no such thing as a "nonstatutory" aggravating factor, only special issue questions. This solitary channeling vehicle is rendered utterly arbitrary by the lack of any guidance as to the meaning of the terms. Thus, unlike Georgia, this state's aggravating information is not given a valid guided or limiting vehicle for jury consideration.

114. The Texas scheme also differs significantly from that in Louisiana which was also approved by the Supreme Court. There, the Court determined that the aggravating consideration was completed during the guilt-innocence phase of trial by virtue of the elements of capital murder. See Lowenfield, supra. In Texas, however, both the legislature and the Court of Criminal Appeals have determined that the second phase serves an integral narrowing function with respect to the consideration of aggravating information. See Smith v. State, 779 S.W.2d 417, 420 (Tex. Crim. App. 1989); Roney v. State, 632 S.W.2d 598, 603 (Tex. Crim. App. 1982). Yet that function is articulated through the

special issue questions, which employ terms that result in standardless capital sentencing determinations. Such a result runs directly counter to the Eighth Amendment's requirement that there be a rational process to determine who lives and who dies.

A. The Second Special Issue

115. The terms in the second special issue are indisputably vague. The word "probability" has no common or uniform meaning. A reasonable juror is left to apply any of the many plausible definitions including: fifty percent plus one, a substantially greater than a fifty percent possibility and, technically, any chance, including one in a million. Similarly, there is no clear and objective meaning to the phrases "criminal acts of violence" or "continuing threat to society."

116. The various words and phrases in the second special issue, when viewed individually and considered as a whole, do not provide the sentencer "'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the process for imposing the sentence of death." Jeffers, Walton, supra. They do not limit the sentencer's discretion, because a person of ordinary sensibility could fairly characterize almost every person convicted of capital murder as having some "probability" of committing criminal acts of violence that would constitute a continuing threat to society. See Godfrey, 446 U.S. at 428-429.

117. Given that the terms of the second special issue are unconstitutionally vague, the next inquiry under Walton and

Jeffers is whether the Texas courts apply a valid limiting construction which could cure the lack of clear and objective standards in the second special issue. They do not. In fact, the Texas Court of Criminal Appeals has patently rejected any limiting construction on the terms in the second special issue.

118. In Holland v. State, 761 S.W.2d 307, 327 (Tex. Crim. App. 1988), the Court of Criminal Appeals specifically acknowledged that its standard of review for sufficiency of the evidence under the second special issue is unbridled, with the Court simply considering the individual facts of each case without applying any limiting construction. The Court stated: "[We] observ[e] the rule stated in Cannon v. State, 691 S.W.2d 664 (Tex. Crim. App. 1985), cert. denied, 474 U.S. 1110 (1986) that each case must be decided on its own merit . . . [and] hold that the evidence adduced at trial supports the affirmative response to the second interrogatory." 761 S.W.2d at 327.

119. Cannon, from which the Texas rule derives, is particularly instructive on the absence of a limiting construction of the second special issue. In Cannon, the Court of Criminal Appeals merely recited the facts surrounding the crime, and then characterized them as showing

> on the part of the appellant, a total lack of regard for the ownership of property, sanctity of life and respect for the personal dignity of individuals who had gone out of their way to help him.

691 S.W.2d at 678. The Court acknowledged in passing that Cannon was only 17-years-old and illiterate, but then stated its

conclusion concerning the sufficiency of the evidence: "There was sufficient evidence to support the jury's affirmative finding. . . . Each of these cases must be decided on its own merits." Id. at 678-679.

120. Texas' construction of the second issue, as stated in Holland and Cannon, is no construction at all: the decision whether the evidence supports the second special issue in any given case is governed by no rational objective standard, but instead rests upon the Court's independent judgment when it views the facts. See e.g. Pyles v. State, 755 S.W.2d 98, 123 (Tex. Crim. App. 1988); Williams v. State, 773 S.W.2d 525, 538 (Tex. Crim. App. 1988), cert. denied, ___ U.S. ___, 110 S.Ct. 257, 107 L.Ed.2d 207 (1989) (reciting facts of case and then announcing evidence sufficient to support second special issue); Livingston v. State, 739 S.W.2d 311, 341 (Tex. Crim. App. 1987), cert. denied, 487 U.S. 1210 (1988); Gardner v. State, 730 S.W.2d 675, 679 (Tex. Crim. App. 1987), cert. denied, 484 U.S. 905 (1987); Santana v. State, 714 S.W.2d 1, 5-6 (Tex. Crim. App. 1986); Earvin v. State, 582 S.W.2d 794 (Tex. Crim. App. 1979), cert. denied, 444 U.S. 919 (1979).

121. Such standardless appellate consideration of vague aggravating circumstances was expressly condemned in both Godfrey and Maynard. This condemnation was then reaffirmed in Walton v. Arizona and Lewis v. Jeffers. The Supreme Court in Godfrey "plainly rejected that the submission that a particular set of facts surrounding a murder . . . were enough themselves, and

without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty." Maynard, 486 U.S. at 363. A State court's conclusion that "on th[e] facts the jury's verdict that the [aggravating circumstance] was supportable [does] not cure the constitutional infirmity of the aggravating circumstance." Id., 486 U.S. at 364; see also Godfrey, 446 U.S. at 432 (unconstitutional aggravating circumstance not cured by appellate court's assertion that the circumstance was "factually substantiated").[31]

122. Precisely as in Godfrey and Maynard, Texas' unconstitutionally vague second special issue has not been cured by the Texas courts. The Texas Court of Criminal Appeals, like the Georgia court in Godfrey and the Oklahoma court in Maynard, adheres to the standardless practice of simply considering the facts of a case to assess the propriety of an affirmative answer to the special issue. This is constitutionally unacceptable. Cf. Walton v. Arizona and Lewis v. Jeffers.

123. The lack of a limiting construction in Texas is highlighted by the consistent proffer that "[t]he circumstances of the offense itself can sustain a 'yes' answer if they are severe enough . . . or can fail to support it if they are not and are unsupplemented by other evidence." Muniz v. State, 573

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[31] Maynard itself acknowledged that "the conclusion of the Oklahoma court that the events recited by it 'adequately supported the jury's finding' [is] indistinguishable from the action of the Georgia court in Godfrey, which failed to cure the unfettered discretion of the jury to satisfy the commands of the Eighth Amendment." 486 U.S. at 364.

S.W.2d 792, 795 (Tex. Crim. App. 1978), cert. denied, 442 U.S. 924 (1979) (citations omitted). By stating that an affirmative answer is justified if the circumstances are "severe enough," the Court has simply substituted one vague term for another, again impermissibly relying on the invalid principle that "a particular set of facts surrounding a murder" can themselves support the death penalty. Maynard, 486 U.S. at 363.

124. In fact, neither in Muniz nor in any other case has the Court employed any limiting construction for determining when the facts of a crime are "severe enough" to warrant an affirmative answer. The arbitrariness inherent in the Texas court's practice is evident from the fact that the "brutal" murder in Muniz supported an affirmative finding, while the "brutal" murder in Garcia v. State, 626 S.W.2d 46 (Tex. Crim. App. 1981) did not.[32] Simply put, Muniz was "struck by

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[32] The Court of Criminal Appeals has likewise stated that there are no limitations upon what can be considered in determining the sufficiency of evidence under the second issue. See Keeton v. State, 724 S.W.2d 58 (Tex. Crim. App. 1987) (providing nonexclusive list of factors underlying inquiry of sufficiency of evidence under special issue two). Indeed, in numerous cases, the Court has found sufficient evidence to support an affirmative answer to the second issue by upholding affirmatively answers based upon factors never mentioned in Keeton, including such amorphous factors as the "total lack of regard for the ownership of property." Cannon v. State, 691 S.W.2d 664, 678 (Tex. Crim. App. 1985). See Crawford v. State, 617 S.W.2d 925, 933 (Tex. Crim. App. 1980), cert. denied, 452 U.S. 931 (1981) (considering lack of remorse); McMahon v. State, 582 S.W.2d 786 (Tex. Crim. App. 1978), cert. denied, 444 U.S. 919 (1979) (considering fact that greed motivated the crime); Duffy v. State, 567 S.W.2d 197 (Tex. Crim. App. 1978), cert. denied, 439 U.S. 991 (1978) (considering fact that victim would not have been threat to defendant); Smith v. State, 540 S.W.2d 693 (Tex. Crim. App. 1976), cert. denied, 430 U.S. 922 (1977)(considering (continued...)

lightning," while Garcia was not. Furman v. Georgia, 408 U.S. 238, 309 (1972) (Stewart, J., concurring).

125. The standardless review typified in Muniz and Garcia is repeated over and over again in cases involving the sufficiency of evidence supporting the second special issue.

126. For instance, the Court of Criminal Appeals held in Smith v. State, 779 S.W.2d 417 (Tex. Crim. App. 1989), that the evidence did not support an affirmative answer to the second special issue, even though Mr. Smith raped and killed a woman by entering her home and tying her to the headboard of her bed and then repeatedly stabbing her with scissors. The evidence also suggested that, for several weeks, Smith had been plotting to commit a rape. The offense was described by the State's forensic pathologist as "overkill."

127. On the other hand, the Court of Criminal Appeals in Hawkins v. State held that precisely such forethought is "probative of [a person's] propensity to commit future acts of violence." 660 S.W.2d 65, 82 (Tex. Crim. App. 1983). In Hawkins the Court of Criminal Appeals found that Hawkins had been "looking around . . . 'for somebody to rape,'" and that eventually he walked into the victim's home, raped her, and stabbed her repeatedly. Id. Nearly identical evidence was sufficient to support an affirmative finding of future dangerousness in Hawkins' case, but not in Smith's.

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[32](...continued)
fact that defendant made no effort to rehabilitate himself).

128. In contrast to Smith, the Court of Criminal Appeals held in Earvin v. State, 582 S.W.2d 794 (Tex. Crim. App. 1979), cert. denied, 444 U.S. 919 (1979), that the evidence of the crime alone supported an affirmative answer to the second special issue. The Court so held despite the fact that Mr. Earvin shot a man at a gas station who made a sudden movement as if to reach for a gun. Mr. Earvin then threw down his gun in terror and fled. When he was arraigned he cried before the magistrate, and admitted he shot the man but said he didn't intend to kill him. He was 18 at the time of the offense, and had no prior criminal history.

129. Yet in Huffman v. State, 746 S.W.2d 212 (Tex. Crim. App. 1988), the appellant killed his neighbor by applying pressure to her heart, beating her about the face, kicking her repeatedly and strangling her. After killing her he stole her car and led the police on a high speed chase in which he rammed two police cars. He attacked two officers before being taken to court. At the hospital, he became uncontrollable and had to be restrained by leather cuffs. He had two prior convictions for burglary, the latter while on parole for the former. He had repeatedly beaten his girlfriend and had bragged to both his girlfriend and a neighbor that he knew how to kill a person by pushing the nose bone up into the brain or hitting them hard enough in the chest to flood the heart. Remarkably -- particularly when weighed against the evidence in Mr. Earvin's

case -- the court found this evidence insufficient to support an affirmative answer to the second special issue.

130. In Green v. State, 682 S.W.2d 271 (Tex. Crim. App. 1984), cert. denied, 470 U.S. 1034 (1985), the Court of Criminal Appeals found the evidence sufficient to support an affirmative answer to the second special issue even though appellant was not the triggerman. There was no evidence that Green helped plan the burglary which led to the killing, there was no evidence that any of the perpetrators expected a murder to be committed, and the State produced no evidence of either prior felony convictions or prior unadjudicated violent conduct on the appellant's part. In addition, appellant introduced the testimony of four work associates, each of whom testified he had known the appellant many years, had never heard of him being in trouble, and each of whom stated that he was a professional, reliable cement mason. Two witnesses testified that, notwithstanding his conviction for capital murder, they would rehire the appellant if he were released.

131. If any distinguishing principle exists to explain these cases, it would be that the evidence in Green and Earvin does not appear to support an affirmative answer to the second special issue, and that the evidence in Huffman and Smith does. Yet the Court of Criminal Appeals decided them in exactly the opposite fashion. Further, the Court of Criminal Appeals has stated that precisely the same evidence -- i.e., forethought and

planning in connection with a rape/murder -- supported a finding of future dangerousness in Hawkins, but not in Smith.

132. In Jurek v. Texas, 428 U.S. 262 (1976), a plurality of the Supreme Court conditionally upheld the Texas capital punishment statute, while specifically acknowledging that the Texas Court of Criminal Appeals had not yet "define[d] precisely the meanings of such terms as 'criminal acts of violence' or 'continuing threat to society'" in the second special issue. Id. at 272 (Stevens, Stewart, Powell, JJ.). Fourteen years later, the Texas Court of Criminal Appeals has still not defined the vague terms in the second special issue ("probability," "criminal acts of violence," and "a continuing threat to society"). Such failure has rendered the second special issue a meaningless ball of confusion. In Texas, there is simply no rational way to determine the definition of the terms in the question by comparing the cases determined to be deserving of death with those deserving of life.

133. Mr. Spence's jury was instructed in the bare terms of this vague special issue and thus did not receive the constitutionally required "specific and detailed guidance" concerning the meaning and application of the aggravating second special issue. See Godfrey v. Georgia, 446 U.S. at 428. Moreover, as in Godfrey and Maynard, the Texas Court of Criminal Appeals has provided absolutely no limiting construction to save the second special issue from its constitutional infirmity. Mr.

Spence's death sentence is therefore unconstitutional. See Walton v. Arizona and Lewis v. Jeffers.

B. The First Special Issue Question

134. The first Texas special issue, which requires a finding that "the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation the death of the deceased or another would result," is equally unconstitutionally vague. Tex. Code Crim. Proc. Art. 37.071(b)(1). The use of the bald term "deliberately," without more, deprived Mr. Spence's jury of clear and objective standards that provide specific guidance regarding the limited meaning and application of the first special issue. Godfrey, 446 U.S. at 428; Penry v. Lynaugh, 492 U.S.302 (1989). Moreover, as with the second special issue, the Texas court has neither created nor applied here a constitutional limiting construction to the issue. Mr. Spence's death sentence must be reversed.

135. The term "deliberately," already vague, was never defined for the jury that sentenced Mr. Spence to death. As with the terms in the second special issue, "deliberately" lacks any clear and objective meaning. There is no difference in common usage between "deliberate" and "intentional."

136. The Court of Criminal Appeals has repeatedly held that the word "deliberate," as employed in the Texas death penalty statute, has a meaning that is different from the meaning of "intentional." See, e.g., Lane v. State, 743 S.W.2d 617, 628-29

(Tex. Crim. App. 1987); Heckert v. State, 612 S.W.2d 549, 552-53 (Tex. Crim. App. 1981). Therefore, the Court has consistently refused to require trial courts to instruct a capital sentencing jury on the meaning of "deliberate" in the first special issue. See Penry v. Lynaugh, 106 L.Ed.2d 256, 280 (1989) ("[n]either the Texas Legislature nor the Texas Court of Criminal Appeals have defined the term 'deliberately'"). Indeed, members of the Court of Criminal Appeals have over the years commented on how misunderstood, confusing and unclear is the meaning of the term "deliberate" to judges, juries and lawyers throughout the state. See, e.g., Lane v. State, 743 S.W.2d 617 (concurring opinion of Duncan, J.).

137. Despite the lack of clarity in the word "deliberately," Mr. Spence's jury received a bare, standardless charge requiring it to make a determination about the vague term of "deliberateness." Given the diverse meanings of "deliberate," the determination of the first special issue was left to the "uncontrolled discretion of a basically uninstructed jury." Godfrey, 446 U.S. at 429. Because the jury received no clarifying limiting instruction, there is no way to determine whether Mr. Spence's jury defined "deliberately" in a manner inconsistent with every other capital sentencing jury in the history of Texas. Having received no "specific and detailed guidance" as to the meaning of this vague aggravator, the jury's finding of "deliberateness" is not "rationally reviewable" and therefore unconstitutional. Godfrey, 446 U.S. at 428.

138. The Court of Criminal Appeals has also failed to apply a limiting construction to the first special issue, as required by the recent decisions of Walton v. Arizona and Lewis v. Jeffers. The Court has defined what "deliberately" is not, but it has never defined what deliberately is by providing a limiting construction for the phrase.

139. The Court has indicated that one need not act with premeditation to act "deliberately." Granviel v. State, 552 S.W.2d 107, 123 (Tex. Crim. App. 1976), cert. denied, 431 U.S. 933 (1977). Likewise, the Court has stated that "deliberately" "embraces more than a will to engage in conduct and activates the intentional conduct" Fearance v. State, 620 S.W.2d 664, 677 (Tex. Crim. App. 1985). Nevertheless, by merely stating that the phrase "embraces more than" a will to act, the Court fails to provide any limiting or reviewable principle to the term.

140. Furthermore, the Court has stated that a finding of "deliberateness" requires "the moment of deliberation and the determination on the part of the actor to kill." Goodman v. State, 701 S.W.2d 850 (Tex. Crim. App. 1985). Such tautological definition of "deliberateness," (using the word "deliberation") provides no meaningful guidance concerning the nature of the first special issue. The Court has used the vague term itself to define that vague term. Clearly, such "definition" is not constitutionally sufficient. Moreover, the "determination of the part of the actor to kill" reflects nothing more than the formation of intent to kill. Unlike the limiting instruction the

Arizona Supreme Court applies to the "especially cruel, heinous and depraved" aggravating factor, see Walton v. Arizona, the Texas Court of Criminal Appeals does not provide a narrowing construction in its appellate review.

141. The Court's lack of a limiting principle is further evidenced by the fact that it has relied upon a non-exclusive list of possible factors which underlie any determination of deliberateness. See e.g., Livingston v. State, 739 S.W.2d 311, 339 (Tex. Crim. App. 1987) (considering various factors in its determination of sufficiency of evidence for affirmative answer to special issue one). The first special issue aggravator is thus unconstitutionally vague because it fails to fulfill its requirement of narrowing the class of death-eligible persons by rationally channeling the jury's discretion. Truly, a "person of ordinary sensibility could fairly characterize almost every" intentional murder as being "deliberate." Godfrey, 446 U.S. at 428-429.

142. Like the second special issue, the first special issue on "deliberateness" is unconstitutionally vague, failing to narrow the class of those eligible for the death penalty and thus failing to channel the jury's discretion. This inherent vagueness has not been cured because the Texas courts have consistently refused to apply any limiting construction. The application of the special issue questions in Mr. Spence's case, without a constitutionally mandated limiting instruction violates

his rights under the Eighth and Fourteenth Amendments and similar provisions of Texas law.

THE PROSECUTORS ENGAGED IN REPEATED AND CONTINUING MISCONDUCT IN VIOLATION OF MR. SPENCE'S RIGHTS.

143. The actions of the prosecutors in Mr. Spence's case were lawless and outrageous, profoundly distorting the truth-seeking function of the trial and wholly denying him due process of law. Their actions, including but by no means limited to those examples which follow, deprived Mr. Spence of rights guaranteed him by the federal Constitution and by the Constitution and laws of the State of Texas. Mr. Spence's conviction and sentence of death therefore must be reversed.

144. First and foremost, the prosecutors in Mr. Spence's case engaged in the wholesale misrepresentation of material facts to the jury at both phases of trial. As extensively detailed elsewhere in this Petition, the prosecutors concealed material exculpatory evidence that law enforcement officers uncovered in their investigation of the murders. Had this evidence been disclosed to the defense, as required by Brady v. Maryland, 373 U.S. 83 (1963), the trial doubtless would have ended in Mr. Spence's acquittal. The prosecution also chose to conceal evidence that numerous State's witnesses had been given or promised special treatment in return for their cooperation with the prosecution. As explained in greater detail elsewhere in this Petition, the prosecutors thereby flouted the requirements of the Sixth and Fourteenth Amendments as established by Giglio

v. United States, 405 U.S. 150 (1972), and ignored specific pretrial orders of the court. Further, as set out at greater length elsewhere in this Petition, the prosecutors fabricated inculpatory evidence against Mr. Spence, and knowingly presented false testimony in violation of the constitution. Napue v. Illinois, 360 U.S. 264 (1959); see also Brown v. Wainwright, 785 F.2d 1457 (11th Cir. 1988).

145. In addition, as detailed elsewhere in this Petition, the prosecutors in Mr. Spence's case introduced and emphasized inflammatory "victim impact" evidence at every stage of trial. While some quantity of such evidence may be admissible at the sentencing phase of a capital trial, its introduction at the guilt phase of Mr. Spence's trial was intended to transform the trial into a "rush to judgment." As a result, Mr. Spence's guilt was measured not by the strength of the prosecution's evidence, but by the perceived tragedy of the victims' deaths. Equally important, even if such evidence might otherwise have been admissible, its introduction in Mr. Spence's case violated fundamental fairness because the prosecution simultaneously concealed extensive evidence that the deceased teenagers were hardly the model citizens the State made them out to be.

146. The prosecutorial misconduct in Mr. Spence's case continued throughout voir dire, when the prosecutors took care to misstate the law to numerous prospective jurors. They repeatedly suggested that the meaning of "deliberate" conduct as comprehended by the first special issue of former Art. 37.071 was

equivalent to "intentional" conduct as determined during the guilt phase. They also encouraged the jurors to identify the State with the victims (repeatedly characterizing the victims and their families as the "State's clients"), and employed impermissible hypothetical questions that misinformed the jurors about the law applicable to capital murder trials.

147. During trial, the prosecutors continued to run roughshod over the constitution. In one memorable instance, the prosecutors knowingly provoked a critically important prospective defense witness with inflammatory and irrelevant questions until she was consumed with anger and visibly upset. S.F. (trial) Vol. X at 1595-1606. Not satisfied with that effect, Feazell and Butler continued to badger the witness with explicitly irrelevant and personally insulting questions until she was overwhelmed with emotion and unable to continue testifying. Id. The prosecutors had no good-faith basis for their harassing questions; their only goal (which they handily achieved) was to coerce her into refusing to testify. In this instance, the state's misconduct, condoned by the trial court, violated Mr. Spence's constitutional rights by harassing a crucial witness for his defense so that the witness refused to testify. Webb v. Texas, 409 U.S. 95 (1972) and Washington v. Texas, 388 U.S. 14 (1967).

148. In another instance, the prosecutors knowingly presented misleading testimony from witness Dorothy Miles concerning a highly prejudicial extraneous offense by Mr. Spence that would otherwise have been inadmissible at the guilt phase.

See generally S.F. (trial) Vol. III at 488-end). By eliciting this misleading testimony, which the prosecutors knew related to the extraneous offense, they impermissibly forced Mr. Spence into a no-win situation: he was compelled either to leave the jury with the harmful impression that the misleading testimony was an admission of his guilt to the "lake murders," or to introduce the details of the extraneous offense to show that the statement was not such an admission. The prosecutors' misconduct in intentionally eliciting this misleading testimony in order to introduce the extraneous offense robbed Mr. Spence's trial of fundamental fairness and itself justifies reversal of his conviction.

149. The prosecutors in Mr. Spence's case also engaged in inflammatory and materially misleading jury argument at both phases of trial. At the guilt phase, the prosecutors' litany of misconduct included repeated references to their personal belief in the strength of the State's case. See S.F. (trial) Vol. XIII at 1884 ("I believe that the evidence that we have, proved that to you beyond a reasonable doubt"); 1887 ("I think the evidence has clearly shown...."), ("I think there is no doubt that that is what happened"); 1889 ("I think the evidence has done that"), ("As I see the evidence, we have proved..."); 1891 ("I think the evidence has shown who did it"); 1893 ("I think you all will be convinced beyond a reasonable doubt"); 1970 ("I think the evidence showed..."); 2003 (Feazell expressing confidence that

the State's evidence has convinced him)[33]. The prosecutors also complained that the defense was insulting the jury (S.F. Vol. XIII at 1977), and again and again urged the jury to consider the feelings of the victims' families in determining Mr. Spence's guilt (see supra). See S.F. Vol. XIII at 1967 (discussing the parents' "pain" for more than two years), 1970 (expressing feelings of sorrow for Kenneth Franks' father), 1983 ("Mrs. Shaw never dreamed when her little girl dropped her off at work that would be the very last time she would ever see her alive. She told you how things were going, their lives had straightened out .. [Jill's] grades were good"), 2004 (arguing that a lot of people have been waiting two years for the jury's decision). This misconduct, too, demands that Mr. Spence's conviction be reversed.

150. The prosecutors' misconduct continued in their punishment phase arguments. Among other impermissible pleas, the State's attorneys urged the jury to disregard Mr. Spence's mitigating evidence and characterized the defense's argument as a

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[33] A prosecutor commits reversible error when he attempts to bolster the credibility of witnesses with his personal opinion. Gardner v. State, 730 S.W.2d 675 (Tex. Crim. App. 1987); Robillard v. State, 641 S.W.2d 910 (Tex. Crim. App. 1983); Menefee v. State, 614 S.W.2d 167 (Tex. Crim. App. 1981). The Court of Criminal Appeals on many occasions has condemned "any effort on the part of the State to bolster the credibility of its witnesses by unsworn testimony." Brown v.State, 309 S.W.2d 452, 453 (Tex. Crim. App. 1958). "[D]etermination of the credibility of a witness is the job of the factfinder, not investigators and prosecutors. It is thus improper to suggest to the jury that they should defer to another's assessment of the truthfulness of testimony, no matter how 'experienced' that other may be." Gardner, 730 S.W.2d at 698. This misconduct alone justifies granting Mr. Spence habeas relief.

"ploy" (see S.F. (trial) Vol. XV at 2354), hammered on the inflammatory victim-impact evidence they had presented at both phases of trial (Id. at 2347, 2349, 2354, and passim), and urged the jurors to consider the possibility that Mr. Spence would be paroled and released from prison if they imposed a life sentence (Id. at 2356). All these arguments, severally and collectively, deprived Mr. Spence of a fundamentally fair trial.

151. The cumulative effect of the prosecutors' multifarious violations of rights guaranteed to Mr. Spence by the federal Constitution and the Constitution and laws of the State of Texas was to deny him a fundamentally fair trial. Mr. Spence's conviction and sentence must be overturned.

THE TRIAL COURT ERRED IN DENYING MR. SPENCE'S MOTION FOR A CHANGE OF VENUE.

152. In accordance with Article 31.03 of the Texas Code of Criminal Procedure, Mr. Spence filed a pre-trial Motion for Change of Venue on the ground that there existed in McLennan County, Texas prejudice [against Mr. Spence] that was "so great and widespread as to render a fair trial impossible in McLennan County." S.F. (Pre-Trial) Vol. 1 at 70. On May 21, 1984, the trial court held a hearing regarding that motion. See S.F., Pre-Trial Hearing on Defendant's Motion for Change of Venue (hereinafter Venue Hearing). Despite evidence that extensive newspaper, radio and television coverage had blanketed the county with numerous detailed accounts of the facts of the case and Mr. Spence's alleged involvement therein, which in turn created an

overwhelmingly prejudicial atmosphere toward Mr. Spence in the local community, the trial court denied the motion to change venue. Venue Hearing at 46. This denial violated Mr. Spence's rights to a fair trial under the Fifth, Sixth, Eighth and Fourteenth Amendments and Texas law, and requires reversal of his conviction and death sentence.

153. Mr. Spence's motion for change of venue was timely filed, and was accompanied by two affidavits in addition to his own attesting that a fair trial in McLennan County was impossible. S.F. (Pre-Trial) Vol. 1 at 70-75. In addition, three witnesses drawn from the community testified at Mr. Spence's request. Venue Hearing at 2-45. These witnesses described the pervasive publicity in the community about the crime, the community's rapt attention to the case, and the statements of the District Attorney's Office announcing Spence's arrest and urging the public to impose tough sentences on criminals.

154. Venue is of constitutional import because the Fourteenth Amendment's due process clause protects a defendant's Sixth Amendment right to be tried by "an impartial jury free from outside influences." Sheppard v. Maxwell, 384 U.S. 333, 362 (1966) The test to be applied in evaluating a change of venue motion is:

> Where outside influences affecting the community's climate of opinion as to a defendant are inherently suspect, the resulting probability of unfairness requires suitable procedural safeguards, such as a change of venue, to assure a fair and impartial trial.

Adami v. State, 524 S.W.2d 693, 703 (Tex. Crim. App. 1975) (quoting Pamplin v. Mason, 364 F.2d 1 (5th Cir. 1966); Morris v. State, 488 S.W.2d 768 (Tex. Crim. App. 1973); Bridges v. State, 471 S.W.2d 827 (Tex. Crim. App. 1971).

155. This Court has affirmed the principle that a change in venue may be indispensable to an impartial jury untainted by outside influences. See Bell v. State, 582 S.W.2d 800 (Tex. Crim. App. 1979). In Phillips v. State, 701 S.W.2d 875, 878 (Tex. Crim. App. 1985), this Court held that a change of venue must be granted where there exist substantial doubts that a fair and impartial jury can be obtained in the county.

156. Evidence elicited during a pre-trial hearing on a venue motion may mandate that the trial court grant the change of venue to ensure the defendant a fair and impartial jury trial. See Rideau v. Louisiana, 373 U.S. 723 (1963). This Court has listed some relevant factors in determining whether outside influences that affect the community's climate of opinion are inherently suspect in Henley v. State, 576 S.W.2d 66, 71-72 (Tex. Crim. App. 1979). These are:

1) the nature of pretrial publicity and the particular degree to which it has circulated in the community,

2) the connection of government officials with the release of publicity,

3) the length of time between the dissemination of the publicity and the trial,

4) the severity and notoriety of the offense,

5) the area from which the jury is to be drawn,

6) other events occurring in the community which either affect or reflect the attitude of the community or individual jurors toward the defendant, and

7) any factors likely to affect the candor and veracity of the prospective jurors on voir dire.

An analysis of several of these factors indicates that influences in the community existed which could have substantially affected the answers given by the venirepersons on voir dire, the testimony of witnesses at Mr. Spence's trial and other aspects of the proceedings such that a fair and impartial trial could not be had in McLennan County. See Henley, 576 S.W.2d at 72.

157. Mr. Spence produced evidence that widespread and prejudicial pre-trial publicity was circulated throughout the community. All of the local media -- newspapers, television stations, radio stations -- published extensive stories about the crime and about Mr. Spence's arrest and alleged connection to the crime. See, e.g., Defendant's Exhibits to Hearing on Motion for Change of Venue (encompassing innumerable transcripts of radio and television broadcasts about the case, as well as many newspaper articles drawn from local papers). Much of the publicity detailed the alleged facts of the offense, including lengthy descriptions of the manner of the victims' deaths and Mr. Spence's prior conviction for aggravated sexual assault in McLennan County. Id. This flood of adverse publicity placed upon Mr. Spence the unfair burden of displacing those purported facts from the mind of the jury.

158. The severity and notoriety of this offense was extreme, since three teenagers were gruesomely killed. The victims were two minor females and an eighteen year-old male, and considerable publicity focused on their youth and the tragedy of their deaths at such a young age. The McLennan County public was repeatedly reminded that the female victims were found nude, and were apparently tortured and sexually assaulted. All three victims were stabbed numerous times. This grisly multiple murder of three teenagers was the "crime of the year" in McLennan County, and publicity about the crime was extremely heavy.[34]

Mr. Spence was not indicted for this crime until more than a year after it occurred, and enormous community pressure weighed on law enforcement officials to "solve" the case. After Mr. Spence and three other men were indicted for the murders, District Attorney Vic Feazell held an inflammatory press conference:

> Kenneth, Jill and Raylene had hopes, dreams and plans for the future. They had friends and loving families. Now all that's left of Jill, Raylene and Kenneth are memories, the grief of parents and friends, and an obligation on our part to bring their killers to justice.... for their sakes, and for the sake of the well-being of our community.... My office is ready to prosecute these cases. We intend to prove that David Spence, Gilbert Melendez, Anthony Melendez and Muneer Deeb acted together to extinguish the lives of three helpless, innocent teenagers.

Defendant's Exhibit 20 at Venue Hearing.

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[34] It was virtually impossible to reside in McLennan County at the time of the crime and not be exposed to publicity regarding it. In fact, throughout voir dire potential jurors and actual jurors revealed that they had seen media coverage of the case. See, e.g., S.F. (Voir Dire) Vol. 5 at 584; Vol. 7 at 868, 915-16, 973.

In McLennan County, there were unprecedented levels of publicity about the crime, Mr. Spence's prior conviction for aggravated sexual assault, and the lengthy investigation and eventual arrest of Mr. Spence. It is easy to imagine how a jury sitting in judgment of a defendant accused of so brutally murdering three teenagers would find it difficult, if not impossible, to remain unbiased and impartial.

159. A factor that this Court did not mention in Henley but that may also constitute evidence of prejudice in the community is the severity of the sentence imposed. See, e.g., Johnson v. Beto, 337 F. Supp. 1371, 1379 (S.D. Tex. 1972). The jury, of course, imposed on Mr. Spence the most extreme penalty provided for under Texas law -- the death penalty.

160. In sum, the probability was so strong that only an unfair trial would be possible in McLennan County that the trial court abused its discretion in denying the motion to change venue. All of the foregoing relevant factors, manifestly supported by the record, demonstrated the critical need to guarantee Mr. Spence's constitutional right to a reliable verdict by providing him with a fair trial in a community not prejudiced or inflamed by the attention and notoriety given to this case. Given this violation of his constitutional rights, Mr. Spence is entitled to a new trial before a fair and impartial jury. Williams v. State, 283 S.W.2d 239 (Tex. Crim. App. 1955).

DEFENSE COUNSEL WAS PROHIBITED FROM INVESTIGATING, DEVELOPING, AND PRESENTING RELEVANT MITIGATING EVIDENCE IN SUPPORT OF A LIFE SENTENCE FOR MR. SPENCE.

161. The State violated Mr. Spence's right to effective assistance of counsel by "interfer[ing] in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." Strickland v. Washington, 466 U.S. 668, 686 (1984). This State interference prevented relevant and probative mitigating evidence from being presented to the jury. Such evidence included, but was not limited to, facts about Mr. Spence's mental and emotional state, his difficult childhood, his drug abuse and severe alcoholism, his turbulent marriage and romantic relationships, and other mitigating facts, in violation of the Sixth Amendment and Texas law. To understand Mr. Spence's claim, it is helpful first to examine what the Supreme Court intended when it forbade the State to ""interfere ... with the ability of counsel to make independent decisions about how to conduct the defense."

162. Among the examples of impermissible governmental interference cited by the Court in Strickland was Brooks v. Tennessee, 406 U.S. 605 (1972). Brooks' analysis confirms that Mr. Spence's right to the effective assistance of counsel was abridged by governmental interference. In Brooks, a Tennessee statute required that the defendant in a criminal case testify as the first witness in the defense case if she were going to testify at all. Failure to testify as the first witness barred the defendant from testifying at all. The rule had been criticized in other jurisdictions for interfering with the tactical decision which the defense was entitled to make

concerning whether, and when, the defendant would testify. This complex tactical decision, guided by the expert advice of counsel, was described by the Court thus:

> It must often be a very serious question with the accused and his counsel whether he shall be placed upon the stand as a witness, and subjected to the hazard of cross-examination, a question that he is not required to decide until, upon a proper survey of all the case as developed by the state, and met by witnesses on his own behalf, he may intelligently weigh the advantages and disadvantages of his situation, and, thus advised, determine how to act. Whether he shall testify or not; if so, at what stage in the progress of his defense, are equally submitted to the free and unrestricted choice of one accused of crime, and are in the very nature of things beyond the control or direction of the presiding judge.

406 U.S. at 608 (quoting Bell v. State, 66 Miss. 192, 194, 5 So. 389 (1889)).

163. The Court held that the Tennessee statute violated the defendant's right to the effective assistance of counsel in choosing whether and when to testify. Id. at 612-613. As the Court explained, "By requiring the accused and his lawyer to make that choice without an opportunity to evaluate the actual worth of their evidence, the statute restricts the defense -- particularly counsel -- in the planning of its case." Id.

164. What emerges from Brooks is the following principle: When a matter of constitutional right is committed "'to the free and unrestricted choice of one accused of crime,'" 406 U.S. at 608, the state cannot interfere with the exercise of that choice or force it to be exercised in a particular way or at a particular time. If the state does so, it impermissibly "interferes ... with the ability of counsel to make independent

decisions about how to conduct the defense." Strickland v. Washington. It is plain that the constitutional defect in the Texas capital sentencing procedure that was identified in Penry operated in violation of this principle in Mr. Spence's case and for that reason, violated his right to effective assistance of counsel.

165. The right to present relevant mitigating evidence in a death penalty case is, like the right to testify or not, a constitutionally-based right entrusted to the free and unrestricted choice of one accused of crime. Like the choice about whether and when to testify, the choice about what mitigating evidence to present and how to present it is a complex tactical matter. When mental-health-based mitigating evidence is available, it is particularly complex. The decision about whether and how to present such evidence will encompass, at a minimum, an evaluation of (a) the capacity of the mental health evidence to reduce the defendant's blameworthiness for the crime and to evoke compassion for the defendant; (b) the clarity of the evidence; (c) the quality of the state's rebuttal evidence and the risk that it may discredit the defense evidence, and perhaps, the defense; (d) the risk that the defense mental health evidence may open up the defendant's prior violent or bizarre or ugly behavior that is otherwise not known to the prosecution; (e) the risk that the defendant may be perceived as "defective" and unsalvageable due to his or her disabilities; and (f) the

sensitivities, education levels, openness, intellectual ability and curiosity, and empathic qualities of the jurors.

166. The Texas sentencing procedure interferes dramatically with the defendant's choice of whether and how to present mental-health-based mitigating evidence, including evidence of crippling, long-term drug and alcohol abuse.

167. As the Court recognized in Penry, evidence which lessens a defendant's culpability for violent behavior by explaining that his previous acts of violence were the result of a mental or emotional disability cannot be given mitigating effect under the sentencing procedure in force in Texas at the time of Mr. Spence's trial. Such evidence invariably "suggests a 'yes' answer to the question of future dangerousness," Penry v. Lynaugh, 492 U.S. at ___, 106 L.Ed.2d at 281, because the mental or emotional disability creates a vulnerability to violent behavior which may "diminish [the defendant's] blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future." Id.

168. With respect to mental-health-based mitigating evidence, the "guiding hand of counsel," Powell v. Alabama, 287 U.S. 45, 69 (1932), was thus handcuffed in Texas under former V.A.C.C.P. Art. 37.071. Under the pre-Penry sentencing statute, counsel could seldom dare to put on a full-blown mental-health-based mitigation defense. Rather than the myriad considerations that would ordinarily guide counsel's choices concerning mental health defenses, counsel was severely constrained. He was forced

to decide first whether there were a high probability that the mental health evidence would cause the jury to answer the deliberateness special issue "no," knowing that the more severe the defendant's disability, the more likely that evidence would be to cause the jury to answer the future dangerousness special issue "yes."[35] If counsel determined that the probability that the mental health evidence would call for a "no" answer to the deliberateness issue were not sufficiently great to risk proving the future dangerousness issue, counsel could not offer a mental or emotional impairment mitigation defense. While this might in some cases be the strategy of choice after careful consideration, in Texas it was almost always forced on counsel by operation of the pre-Penry statute. It is hard to imagine a clearer example of the state "interfer[ing] ... with the ability of counsel to make independent decisions about how to conduct the defense." Strickland, 466 U.S. at 686. See Meeks v. Dugger, 576 So.2d 713 (Fla. 1991) (defense counsel's failure to introduce nonstatutory mitigating evidence, which he thought was inadmissible under

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[35] Two observations are pertinent here: first, the inquiry into "deliberateness," as comprehended by the Texas statute, is a de minimis one. The Court of Criminal Appeals has held that only a "moment of deliberation" is necessary to support an affirmative answer to the first special issue. Cannon v. State, 691 S.W.2d 664 (Tex. Crim. App. 1985) Second, in no reported decision has the C.C.A. ever determined that the evidence presented was insufficient, as a matter of law, to support an affirmative answer to the "deliberateness" question. It is absolutely plain that a defense attorney weighing whether to entrust her client's life to the jury's ability to consider mental-health-based mitigating evidence under the first special issue would conclude that the statute forbade her from taking that risk.

Hitchcock v. Dugger, 481 U.S. 393 (1987) was error). Accordingly, Mr. Spence has stated a valid claim for relief, and he should be allowed to prove his factual allegations in an evidentiary hearing.[36]

169. The Eighth Amendment is also violated when a capital sentencing statute is authoritatively interpreted to restrict the evidence that the sentencer may consider, and "evidence exists which could have been presented at the sentencing phase if counsel had not believed that the law limited him [or her] to statutory mitigating circumstances." Booker v. Dugger, 922 F.2d 633, 636 n.3 (11th Cir. 1991). To evaluate the harm suffered by a defendant whose counsel was hamstrung by an unconstitutional statute, a reviewing court should examine the "post-trial affidavit or testimony of trial counsel ... and proffers of nonstatutory mitigating evidence claimed to have been available at the time of sentencing." Knight v. Dugger, 863 F.2d 705, 759 (11th Cir. 1988) (Clark, J., concurring). See also Smith v. Dugger, 758 F.Supp. 688, 693 (N.D. Fla. 1990) ("In reviewing a [mitigation preclusion] claim, a ... court must first determine whether there was any credible nonstatutory mitigating evidence that the jury either did hear or could have heard....") (emphasis

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[36] Unlike the form of ineffective assistance due to the deficient performance of counsel, prejudice does not have to be established when the state violates the right to effective assistance. "Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance." Strickland, 466 U.S. at 692.

added); Meeks v. Dugger, 576 So.2d 713 (Fla. 1991); Hall v. State, 541 So.2d 1125, 1127 (Fla. 1989).

170. Tex. Code Crim. Proc. Art. 37.071 codifies, and Mr. Spence's jurors were instructed upon, "special issues" -- factual questions which jurors in every capital case must answer, and whose answers dictate whether life or death will be imposed. This Court cannot dispute that these issues do not encompass all the "diverse frailties of humankind" which a capital sentencer must be empowered to consider and give effect in passing sentence. See Penry v. Lynaugh, 492 U.S. 302 (1989); McCleskey v. Kemp, 481 U.S. 279, 288 (1987).

171. Because the Texas statute cannot anticipate or collect all the mitigating circumstances that might be relevant in a capital sentencing hearing -- indeed, because no statute can -- capital sentencing statutes and jury instructions must make clear that the statute itself does not limit the circumstances which can be considered in mitigation. Hitchcock v. Dugger, 481 U.S. 393 (1987). And, because of this flaw in the Texas statute, Mr. Spence' sentencing proceeding was constitutionally defective. Because of the inherent limitation in the statute, which had repeatedly, if reflexively, been affirmed by the U.S. Supreme Court -- in Jurek, Lockett, and by implication in Barefoot -- reasonable defense counsel could neither develop nor present evidence which, while mitigating, could not have been considered by the jury even if it had been presented. Booker, supra; Knight, supra; Meeks, supra.

172. The constitutionally impermissible outcome is any restriction of sentencer consideration of relevant mitigating evidence. Sentencers are a fortiori precluded from considering mitigating evidence which, because of the statute's effect on counsel, is not presented. Mr. Spence has already discussed how the mitigating conclusions which the jury could have drawn from the evidence before them could not be given effect by the jury in answering the special issue questions. Next, he will address how appellate courts' uniform endorsement of the constitutionality of the unadorned Texas statute precluded counsel from developing and presenting relevant mitigating evidence, in violation of the Sixth, Eighth, and Fourteenth Amendments.

173. This Court cannot seriously contend that counsel in 1984 would have regarded the Texas capital sentencing statute as pregnant with constitutional peril, despite its limitation on the consideration of certain mitigating evidence which has since become apparent; see Penry; see also Black v. State, ___S.W.2d___ (Tex. Crim. App., delivered May 29, 1991). The highest court in the land -- not to mention the highest court in the State -- had endorsed the Texas statute without qualification; it is thus plain that reasonable counsel would not have spent precious resources to investigate and develop such evidence.

174. The law in 1980 was sharply defined: the special issues were exclusive in capital cases; no additional jury instructions were constitutionally required, and none would be allowed. Once this Court acknowledges, as it must, that defense

counsel faithfully followed the state and federal courts' authoritative interpretation of Texas law, it must grant Mr. Spence relief. The smokescreen of "tactical decisions," see Ex Parte Goodman,[37] cannot obscure the reality of legal practice: lawyers make "tactical decisions" "in the context of the law as it then exist[s]." Smith v. Dugger, 758 F.Supp. 688, 693 (N.D. Fla. 1990). If the law upon which counsel relied later proves unconstitutional, her client should not be penalized for counsel's forced "choices" at the time of trial.

175. The Florida Supreme Court's experience with a similar and controlling issue is instructive.[38] The Florida capital sentencing statute contained an exclusive and enumerated list of mitigating circumstances which a capital sentencer might consider. When the Florida Supreme Court first interpreted the Florida statute in the mid-to-late 1970s, it expressed the opinion that this exclusive list was constitutional.

176. In Hitchcock v. Dugger, the U.S. Supreme Court proved the Florida Court's conclusion to have been premature -- and wrong. Since Hitchcock, thus, the Florida Supreme Court has been faced with a problem identical to that facing the courts

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[37] Ex Parte Goodman, ___ S.W.2d___, No. 70,877 (Tex. Crim. App. 1991), slip op. at 4-5 n.6.

[38] The entire opinion in that case, Meeks v. Dugger, commends itself to this Court's attention, both for the close parallels between the post-Hitchcock legal landscape in Florida, and the post-Penry situation in Texas, and for that Court's fair and evenhanded resolution of the dilemma presented by non-record mitigating evidence.

measuring the performance of Texas attorneys during the years after Jurek and before Penry. Florida, admirably, has lately acknowledged its earlier, restrictive interpretation of its own statute. Accordingly, the Florida courts now permit attorneys to present in habeas corpus proceedings the evidence which they neglected to investigate or develop at trial because of the preclusive effect of their statute. Booker, supra; Knight, supra; Meeks, supra; Smith, supra.

177. Florida has not abolished the death penalty by permitting defendants with valid claims a fair opportunity to litigate them. The reviewing court must still find counsel's explanation true (that is, it must determine that the "real reason" behind counsel's failure was the statute, and not some other motivation), and the error may still be judged harmless beyond a reasonable doubt. See Knight v. Dugger, 863 F.2d 705, 759 (11th Cir. 1988); Meeks, supra. The Texas Court of Criminal Appeals' continuing refusal to follow a similar course, see Ex Parte Goodman,[39] despite having finally conceded the utterly unanticipated character of the decision in Penry, see Black v. State,[40] smacks of rank, result-oriented hypocrisy. This Court should give Mr. Spence a fair chance to prove the truth of his

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[39] Ex Parte Goodman, ___S.W.2d___, No. 70,877 (Tex. Crim. App. 1991), slip op. at 4-5 n.6. But see Ex Parte Allridge, No. 71,003, slip op. at 1 (Tex. Crim. App. June 26, 1991).

[40] Black v. State, ___S.W.2d___, No. 69,648 (Tex. Crim. App. 1991), concurring slip op. (Campbell, J., concurring, joined by McCormick, P.J.; Clinton, Overstreet, Maloney, and Benavides, JJ.)

allegations and demonstrate the unconstitutionality of his death sentence.

178. The only consequence that matters under the Eighth Amendment is that Mr. Spence's sentencer was precluded from considering relevant mitigating evidence in determining whether he should live or die. This commonsensical conclusion requires that this Court stay Mr. Spence's death sentence and order an evidentiary hearing at which he might offer additional proof of his claim. A brief review of some of the mitigating evidence which counsel neither developed or presented because of the apparent constitutional flaw in the Texas capital sentencing statute makes plain why.

179. David Spence was the product of an unhappy childhood marked by frequent family relocation, a drunken and abusive father, and a stark lack of parental supervision and guidance. Not surprisingly, as he grew older David himself fell prey to severe alcoholism. Alcohol daily transformed David from a cheerful and pleasant young man into a sullen and explosively violent one. David's drinking cost him job after job, and ruined his marriage. As an unhappy young adult, his marriage shattered and his life going nowhere, David was later introduced to methamphetamine, a dangerous and addictive drug, of which he eventually became a heavy user. David's relentless consumption of alcohol and his increasing dependency on methamphetamine combined to wreak serious and permanent damage on his physical,

mental and emotional health. This organic injury, in turn, crippled David's ability to act as a normal adult.

180. Despite his unhappy background, and his self-destructive adulthood, David displayed numerous positive character traits which could have been developed as mitigating evidence. For example, despite the unhappy end to their marriage, David continued (and continues) to be devoted to his ex-wife and the two sons she bore him. Evidence of this enduring relationship could have communicated a richly textured message about Mr. Spence's character and background. The jury would have understood that such close family ties, able to withstand such strain, could emerge only from long years of experience with Mr. Spence, and familiarity with all aspects of his character. In other words, the jury could have been shown, under a constitutional sentencing statute, that the very people who knew Mr. Spence best were convinced that he was a worthwhile human being despite his mistakes. Such powerful sentiments cannot be discounted as evidence supporting a life sentence.

181. In addition, David recognized his crippling addiction to alcohol and repeatedly sought help to free himself from it. On several occasions, David participated in counseling programs; he even lived for a time in a residential treatment community in Austin. While there, David managed to stay "clean" for a number of weeks before unexpected events in his personal life drove him back to the bottle. David also attended meetings of Alcoholics Anonymous, and struggled to adhere to that group's rigorous

program. The fact that all David's attempts to overcome his addiction to alcohol fell short of success does not undermine their power as mitigating evidence in support of a life sentence. David's admission that his alcoholism was destroying him, and the tragic story of his failed attempts to conquer it, would have convinced a jury that he was not the "sociopath" that the prosecution's killer psychiatrists made him out to be, and could have persuaded them to give him a life sentence. Other mental-health-based mitigating evidence also existed whose presentation could do Mr. Spence no good, under now-discredited Art. 37.071.

182. All this evidence should have been available to support a life sentence for David Spence. Taken together, the mitigating evidence that could have been presented would have painted a compelling portrait of a man that a rational juror might have wanted to spare from execution -- a man with an unhappy past whose culpability for the offense was lessened by the absence of the usual emotional controls and judgment that a normal adult would possess. Despite the vital importance of this evidence to the jury's determination whether Mr. Spence's crime and his character merited life or death, the Texas Court of Criminal Appeals' unvarying application of the Texas statute would have rendered it deadly to his defense.

183. The preclusive effect of the uniform history of denial of such claims operated to preclude Mr. Spence's trial counsel from fully investigating and presenting mitigating evidence. Thus, because counsel relied on appellate courts' repeated

assurances that the Texas statute permitted a sentencer to consider all constitutionally protected mitigating evidence, none of this evidence was developed or presented at trial. Consequently, the jury's decision cannot be relied upon as the accurate, individualized sentencing determination to which the Constitution entitled David Wayne Spence. Counsel's reliance on the uniform interpretations of the Texas death penalty statute therefore operated to deprive Mr. Spence of his rights under the Eighth and Fourteenth Amendments to the United States Constitution, and require that his death sentence be vacated.

THE COURT ERRED IN ADMITTING HYPNOTICALLY ENHANCED TESTIMONY BY PROSECUTION WITNESSES.

184. The Constitution mandates "heightened reliability" in the proceedings of a capital trial. Johnson v. Mississippi, 486 U.S. 578 (1988); Beck v. Alabama, 447 U.S. 625 (1980); Gardner v. Florida, 430 U.S. 349 (1977); Woodson v. North Carolina, 428 U.S. 280 (1976). This "heightened reliability" requirement may forbid the State from engaging in a practice that undermines the reliability of the proceeding, or may require the State to provide protections that enhance that reliability. See, e.g., Woodson (forbidding State from imposing mandatory death sentence); Gardner (forbidding State from relying on information at sentencing which defendant has had no opportunity to rebut or explain); Beck (requiring State to instruct capital jury on lesser included offense supported by the evidence); Ake v. Oklahoma, 470 U.S. 68 (1985) (requiring State to provide

psychiatric assistance for indigent defendant in capital case). On the facts of Mr. Spence's case, the admission of the hypnotically enhanced testimony of prosecution witnesses violated his guarantee of "heightened reliability" under the Eighth Amendment, and requires that his conviction be reversed.

185. The use of hypnotically enhanced testimony is fraught with peril even under the best of circumstances. The very unreliability of such evidence has played a dominant role in various courts' per se rejection of hypnotically enhanced testimony. See infra. That unreliability can, at best, be ameliorated by the observation of stringent procedural protections. In Mr. Spence's case, those procedural protections were utterly absent. As a result, the admission of hypnotically enhanced testimony in Mr. Spence's case abridged his right to a reliable determination of guilt and sentence.

186. The facts underlying this claim are straightforward. While incarcerated in the McLennan County Jail, Mr. Spence spoke occasionally with another inmate, Daryl Beckham, a convicted felon who was awaiting transfer to the penitentiary. In February, Beckham was contacted by a law enforcement agent, Truman Simons, who questioned him regarding Mr. Spence. At that time, Beckham allegedly related to Simons that Mr. Spence had recently told him that he was involved in the July murder. S.F. Vol. VI at 1013, 1016.

187. Sometime in the second week of February, 1983, soon after he provided Simons with this information, Mr. Beckham was

hypnotized by Bob Prince, a sergeant in the Texas Rangers, in order to remember the details of his conversations with Mr. Spence. S.F. Vol. VI at 1018-1019. Prince had been present at the scene the night the deceased was found. S.F. Vol. I at 23. He was not a psychiatrist or a psychologist experienced in hypnosis. Id. at 24. In fact, he had limited training and experience in hypnosis. Id. at 27. The hypnosis session took place at the office of the Texas Rangers in Fort Fisher, Texas. S.F. Vol. VI at 1024. Prince did not take a statement in any form from Beckham prior to the session to document Beckham's memory before he was hypnotized. In addition to Prince, three other law enforcement officials were present during the hypnosis session: a captain with the sheriff's department, a Waco police officer, and another Texas Ranger. S.F. Vol. I at 25. In the course of the procedure, these officials prompted Prince with written notes containing questions they specifically wanted asked of Beckham. Id. at 25-26. The session was recorded on audio tape only; no videotape of the session exists. Id. at 24.[41]

188. Beckham returned to McLennan County on a bench warrant in September, 1983. S.F. Vol. VI at 1001. He was questioned by Assistant District Attorney Ned Butler, and was shown graphic

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[41] Undersigned counsel is not in possession of these audiotapes. Necessarily, counsel's ability adequately to investigate and present this claim is severely hampered by counsel's not having reviewed these tapes. In addition, counsel requires the assistance of an expert in hypnotic memory enhancement. Accordingly, counsel's present presentation of this challenge is necessarily incomplete, and discovery, expert assistance, and an evidentiary hearing are required before this court may fully and fairly adjudicate it.

photographs of the murder. S.F. Vol. I at 29. Beckham was again interrogated by Simons and gave a written statement to Simons on September 28, 1983, based primarily on the details elicited during the hypnosis session. S.F. Vol. VI at 1002.

189. Mr. Spence was indicted for the capital murder of Jill Montgomery on November 21, 1983. In May, 1984, defense counsel argued in a pre-trial motion that Beckham's hypnotically enhanced testimony should be excluded. S.F. Vol. I at 26-27. This motion was denied by the trial court. Defense counsel renewed his objection to Beckham's testimony at trial based on the fact that the procedural guidelines set out in U.S. v. Valdez, 722 F.2d 1196 (5th Cir. 1984), for the admission of hypnotically enhanced testimony, had not been followed. S.F. Vol. VI at 977. The objection was overruled by the trial court. S.F. Vol. VI at 978. Beckham's hypnotically enhanced testimony was admitted by the trial court without reservation or cautionary instruction.

190. The State's case relied almost exclusively on circumstantial evidence, and as a result Beckham's testimony regarding Mr. Spence's alleged confession was extremely damaging. Further, in closing argument at the guilt/innocence phase of the trial, the prosecutor instructed the jury to consider particularly witnesses' testimony regarding what the defendant had told them about the events at Lake Waco. S.F. Vol. XIII at 1892. He spent several minutes reiterating in detail Daryl Beckham's testimony. He restated what Mr. Spence allegedly told Beckham: that Mr. Spence was afraid the police would suspect him

because he was seen in the vicinity; that he had tied the boy up; that he had raped and killed the women; and that a friend had instructed him to dump the bodies in the park. S.F. Vol. XIII at 1997-1998. Given that little physical evidence linked Mr. Spence to the murder, the State's use of Daryl Beckham's hearsay testimony was highly prejudicial.

191. In Rock v. Arkansas, 483 U.S. 44 (1987), the Supreme Court reviewed the available scientific literature on the reliability of hypnosis and concluded that "[t]he use of hypnosis in criminal investigations . . . is controversial, and the current medical and legal view of its appropriate role is unsettled." Id. at 59. The Court cited the common problems associated with hypnosis, including the subject's increased suggestibility, the tendency to "confabulate" or fill in gaps in the story, and the phenomenon of "memory hardening" which causes the subject to have undue confidence in his hypnotically refreshed testimony, thereby making cross-examination ineffective. Id. at 59-60. The Court concluded that

> [w]e are not now prepared to endorse without qualifications the use of hypnosis as an investigative tool; the scientific understanding of the phenomenon and of the means to control the effects of hypnosis is still in its infancy.

Id. at 61.

192. These problems with hypnotically enhanced testimony make evident why the use of such testimony by the prosecution in a capital murder trial runs afoul of the requirements of the Eighth Amendment.

193. It is instructive that a number of jurisdictions have ruled hypnotically refreshed testimony inadmissible per se. At least one appellate court has held that a witness is incompetent to testify to matters that were discussed while under hypnosis, even if he had some memory of those matters before hypnosis. People v. Shirley, 723 P.2d 1354 (Cal. 1982).[42] Several appellate courts do not entirely bar the hypnotically enhanced testimony, but exclude all testimony of events recalled for the first time while under hypnosis. See, e.g., People v. Lee, 450 N.W.2d 883 (Mich. 1990). Still other courts conditionally admit hypnotically enhanced testimony, but require that stringent procedural safeguards be observed before the testimony may be considered by the factfinder. See, e.g., State v. Armstrong, 329 N.W.2d 386 (Wis. 1983) (proponent of such testimony must show that the testimony was not the result of impermissibly suggestive hypnosis and opponent must be permitted to counter with expert testimony).

194. A number of state courts hold that hypnotically refreshed testimony regarding matters consciously recalled during hypnosis is inadmissible because it invariably violates the defendant's Sixth Amendment right to confront the witnesses against him. See Contreras v. State, 718 P.2d 129 (Ala. 1986); People v. Shirley, 723 P.2d 1354 (Cal. 1982). These state courts

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[42] This rule was subsequently modified by the California legislature to allow some testimony concerning pre-hypnosis memory if strict guidelines had been followed. See West's Ann. Cal. Evid. Code § 795.

have considered the scientific research on hypnosis and have concluded that the inherent unreliability of hypnosis renders it inadmissible under any and all circumstances.

195. In Contreras v. State, 718 P.2d 129 (Ala. 1986) the Supreme Court of Alaska held that hypnotically enhanced testimony was inadmissible against a criminal defendant. It found such testimony to be inherently so unreliable that:

> We are sufficiently persuaded of the potential dangers of suggestibility, confabulation, and enhanced certainty on the part of previously hypnotized witnesses to view the degree of prejudice to the defendant as extremely high and we are not convinced that expert testimony can sufficiently overcome the likelihood that a jury may be mislead by such testimony.

Id. at 138. The Court concluded that a per se rule of inadmissibility was preferable to a case by case analysis by trial judges. The Court rejected the use of procedural safeguards to increase the reliability of hypnotically influenced testimony, fearing inevitably disparate results. Id. at 137-138.

196. In People v. Shirley, 723 P.2d 1354 (Cal. 1982) the California Supreme Court reviewed the problems associated with hypnosis and concluded that

> we join . . . a growing number of courts that have abandoned any pretense of devising workable "safeguards" and have simply held that hypnotically induced testimony is so widely viewed as unreliable that it is inadmissible under the Frye test.

723 P.2d at 1366. The Court held that the testimony of a prosecution witness hypnotized before trial in order to restore his memory of events at issue is inadmissible.

197. In People v. Lee, 450 N.W.2d 883 (Mich. 1990) the Michigan Supreme Court recently rejected a case by case determination of reliability, concluding that

> [t]he tenet that the trial judge can make a determination in each individual case and place the stamp of reliability and credibility on a hypnotized witness' testimony is without merit.

450 N.W.2d at 894. The Court noted that:

> [h]ypnosis has not received sufficient general acceptance in the scientific community to give reasonable assurance that the results produced under even the best of circumstances will be sufficiently reliable to outweigh the risks of abuse or prejudice.

450 N.W.2d at 895 (quoting People v. Gonzales, 415 Mich. 615, 626). The Michigan Court held that the testimony is inadmissible unless there is clear and convincing evidence that the substance of the testimony was recalled before the witness was hypnotized. Id. at 895.

198. Florida recently overruled its previous rule that hypnotically refreshed testimony affects only the weight and credibility of the evidence, and in Bundy v. State, 471 So.2d 9 (Fla. 1985) held such testimony inadmissible per se. See Morgan v. State, 537 So. 2d 973 (Fla. 1989) (modifying Bundy, to conform with Rock v. Arkansas, by permitting hypnotically refreshed testimony by the defendant only).

199. A number of courts which hold hypnotically enhanced testimony inadmissible per se have specifically rejected the proposed solution of procedural safeguards regulating the usage of hypnosis as an investigative method. For example, the California Supreme Court rejected the procedural safeguards set

down in State v. Hurd, 432 A.2d 86 (N.J. 1981),[43] perceiving them as incapable of avoiding risks. The Court feared:

> that the witness will 1) lose his critical judgment and begin to create "memories" that were formally viewed as unreliable, 2) will confuse actual recall with confabulation and will be unable to distinguish between the two and 3) will exhibit an unwarranted confidence in the validity of his ensuing recollection.

Shirley, 723 P.2d at 1366.

200. The Maryland Court of Appeals has held that testimony first recalled during pre-trial hypnosis is inadmissible per se. State v. Collins, 464 A.2d 1028 (Md. 1983). The Court expressly embraced the view expressed in Shirley in rejecting the procedural safeguards set out in State v. Hurd, stating that "[e]ven if requirements could be devised that were adequate in theory, we have grave doubts that they could be administered in practice without injecting undue delay and confusion into the judicial process." Collins, 464 A.2d at 1044. Similarly, in People v. Hughes, 453 N.E.2d 484 (N.Y. 1983), the Court, held

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[43] This case is often cited in the context of procedural safeguards to ensure the reliability of hypnotically refreshed testimony. These safeguards include: 1) a psychiatrist or psychologist experienced in the use of hypnosis must conduct the session; 2) such professional should be independent of, and not regularly employed by, either party; 3) any information given to the hypnotist by either party before the hypnotic session must be recorded in writing or other suitable form, so that the judge can determine the extent of information the hypnotist could have communicated to the witness directly or through suggestions; 4) the hypnotist must obtain from the subject before the session a detailed description of the facts as the subject remembers them, so that the hypnotist may carefully avoid influencing the description by asking structured questions or adding new details; 5) all contacts between hypnotist and subject must be recorded, preferably on videotape; and 6) only the hypnotist and subject may be present during the pre-hypnotic testing, the session itself, and the posthypnotic interview. Hurd, 432 A.2d at 89-90.

recollections induced through pre-trial hypnosis inadmissible per se. The Court feared that procedural safeguards would provide only a "partial solution even if strictly followed." Id. at 494.

201. The Fifth Circuit, while refusing to formulate a per se rule of inadmissibility for cases involving hypnotically enhanced testimony, has established several rigid rules to ensure reliability. Not only must the testimony conform to procedural safeguards, the testimony must also be corroborated and the probative value of the evidence must outweigh its prejudicial effect; "If adequate safeguards have been followed, corroborative post-hypnotic testimony might be admissible." United States v. Valdez, 722 F.2d 1196 (5th Cir. 1984). The Court stressed that a "sufficiently reliable method [exists] for the witness to separate pre-hypnotic memory from post-hypnotic pseudomemory" to ensure its authenticity. Id. at 1204. Required safeguards include preserving the pre-hypnotic memory in tangible form such as a written statement, audiotape or videotape. There should be an opportunity for cross-examination and expert testimony, as well, by the opposing party.

202. All these perspectives point to a single conclusion: even those court which permit the introduction of hypnotically enhanced testimony do so warily and with great reservations. In order to protect the reliability of the proceeding at issue, such courts enforce rigid procedural safeguards which must be observed before such testimony may be admitted. Equally important, many courts have reached the considered judgment that hypnotically

enhanced testimony is so unreliable that it may never be admitted at trial consistent with the requirements of due process. Daryl Beckham's hypnotically enhanced testimony was developed in the complete absence of any such safeguards whatsoever; its admission, thus, violated Mr. Spence's constitutional right to a reliable determination of guilt and sentence.

THE ADMISSION OF EVIDENCE OF UNADJUDICATED EXTRANEOUS OFFENSES AT THE PENALTY PHASE OF MR. SPENCE'S TRIAL DEPRIVED HIM OF PROTECTIONS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

203. At the punishment phase of trial, the state relied upon evidence and argument regarding extraneous offenses in support of its case for the death penalty. In particular, the prosecutors emphasized an allegation that Mr. Spence had sexually assaulted Lisa Kader -- a charge upon which Mr. Spence had neither been brought to trial nor convicted. See S.F. (trial) Vol. XIV at 2104-2146. Such evidence was weighed by the jurors at the penalty phase after they were instructed to consider the evidence submitted during the entire trial in answering the special issues. The jury's decision to sentence Mr. Spence to death, based substantially on evidence of a crime of which another jury had refused to convict him, violated Mr. Spence's Eighth and Fourteenth Amendment rights under the United States Constitution. Mr. Spence's death sentence cannot stand.

204. During the sentencing phase of trial, the state presented the testimony of Lisa Kader. Ms. Kader alleged that

Mr. Spence, armed with a knife, had sexually assaulted her while on a "double date" with another couple. S.F. (trial) Vol. XIV at 2129-2140. The prosecution did not present any evidence that Mr. Spence had ever been convicted of this alleged offense. Nor could it -- the prosecutors had never thought Kader's accusation worth a formal charge or complaint, nor tried to prove her allegations beyond a reasonable doubt in a proceeding where Mr. Spence would be armed with the protections of due process. Instead, the prosecution elected to ambush Mr. Spence with Kader's allegations. Conveniently relieved of having to prove the Kader sexual assault beyond a reasonable doubt, the prosecution was able to argue at closing that this alleged extraneous crime proved that Mr. Spence would be dangerous in the future, and that the death penalty was required, despite the fact that Kader's allegations had never been fairly subjected to adversarial testing. The unfair prejudice resulting from the introduction of a felony offense of which Mr. Spence was never convicted was exacerbated by the trial court's failure to instruct the jury that the state had the burden to prove beyond a reasonable doubt that Mr. Spence had committed that offense before the jury could consider it in answering either of the special issues.

205. The jury's findings, which resulted in an automatic sentence of death, relied on unsubstantiated allegations of alleged criminal activity by Mr. Spence. The verdict at penalty was based primarily on evidence that cannot meet the

constitutional standard of heightened reliability required in capital cases. Unlike proof of prior convictions, evidence of alleged criminal acts, such as that in Mr. Spence's case, "carries with it no similar indicia of reliability." Williams v. Lynaugh, 484 U.S. 935, ___ (1987) (Marshall, J., dissenting from denial of certiorari). The introduction of unadjudicated criminal offenses also lacks reliability because "[a] jury that has already concluded unanimously that the defendant is a first-degree murderer cannot plausibly be expected to evaluate charges of other criminal conduct without bias and prejudice." Id. For these reasons, the introduction of evidence of unadjudicated offenses violated Mr. Spence's right to an impartial jury and a reliable determination of sentence.[44]

206. The State commonly has invoked a line of Fifth Circuit authority to justify its practice of relying on unproven

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[44] The unreliability of evidence of unadjudicated offenses is reflected in the fact that at least half the States authorizing capital punishment impose substantial restrictions on the degree to which such evidence may be used as an aggravating factor. At least nine states do not allow the prosecution to introduce such evidence at all: Alabama (Cook v. State, 369 So.2d 1251 (Ala. 1979)), Florida (Odom v. State, 403 So.2d 936, 942 (Fla. 1981), Indiana (McCormick v. State, 397 N.E.2d 276, 281 (Ind. 1979), Maryland (State v. Scott, 297 Md. 235, 248 (Md. 1983), Nevada (Crump v. State, 716 P.2d 1387, 1388 (Nev. 1986), New Jersey (Rose v. State, 112 N.J. 454, 503 (NJ 1988), Ohio (Johnson v. State, 494 N.E.2d 1061, 1066 (Ohio 1986), South Carolina (Stewart v. State, 320 S.E.2d 447, 450 (S.C. 1984), and Washington (Bartholomew v. State, 654 P.2d 1170, 1184 (Wash. 1982) (en banc). In addition, in at least four States, evidence of unadjudicated offenses cannot be the sole aggravating factor supporting the death sentence: Colorado (Colo. Rev. Stat. § 16-11-103(6) (1986)), Connecticut (Conn. Gen. Stat. Ann., § 53(a)-56(a)(f), (h) (1985), Illinois (Ill. Ann. Stat. Ch. 38, p. 9-1(b) (Supp. 1989), and Montana (Mont. Code Ann., § 56-18-305 (1989).

allegations of wrongdoing at the penalty phase of capital trials. A careful examination of these cases illustrates that the State's reliance is utterly misplaced, and that the wholesale admission of unadjudicated misconduct evidence against capital defendants plainly violates federal constitutional protections.

207. Autry v. Estelle, 706 F.2d 1394 (5th Cir. 1984), is typically cited for the proposition that Texas' routine admission of evidence of unadjudicated offenses in capital sentencing does not offend the constitution. The actual holding of Autry, however, is far different. Autry only considered whether the admission of "other crimes" evidence implicated the concerns of Jurek v. Texas, 428 U.S. 262 (1976), which dealt with the jury's ability to consider mitigating evidence, not its reliance on aggravating evidence like unadjudicated misconduct. In fact, the Autry court specifically included the caveat that the practice of admitting evidence of unadjudicated offenses "may implicate other constitutional concerns," 706 F.2d at 1406 n.5. Finally, and perhaps most importantly, the offenses at issue in Autry were prior convictions -- not mere unsupported (or, as here, rejected) allegations of prior criminal activity.

208. Similarly, in Milton v. Procunier, 744 F.2d 1091 (5th Cir. 1985), the Court (after quoting at length from Autry) concluded that, on the facts before it, the evidence regarding previous criminal activity was not a "crucial, critical, [or] highly significant factor" in the jury's decision at sentencing. 744 F.2d at 1097 (quoting Skillern v. Estelle, 720 F.2d 839, 852

(5th Cir. 1983).[45] The most that Milton may be said to hold, then, is that, in a particular case, the admission of previous offenses may be harmless. Milton is manifestly inapposite in Mr. Spence's case, where the State's reliance on this evidence in its plea for the death penalty was overwhelming.

209. Finally, the State frequently invokes Williams v. Lynaugh, 814 F.2d 205 (5th Cir.), cert. denied 484 U.S. 935 (1987), and Landry v. Lynaugh, 844 F.2d 1117 (5th Cir. 1988) in defense of this practice. Williams, like Milton, relied on Autry; it involved a challenge based on relevance, not reliability; and the particular evidence in question possessed independent indicia of reliability in any event. The Williams court concluded that concerns about preventing a defendant from being punished for a crime for which he is not on trial, "are addressed by properly applied standards of relevance and sufficiency of proof." Id. at 208. Of course, no such "properly applied standards..." were employed to safeguard Mr. Spence's rights to a reliable sentencing determination; his jury was not instructed concerning any appropriate standard whatsoever for evaluating evidence of unadjudicated offenses. Thus, Williams cannot defeat Mr. Spence's challenge. Landry, like Autry, involved an adjudicated criminal conviction, not an allegation

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[45] Cf. State v. Brooks, 541 So.2d 801 (La. 1989) (evidence of unadjudicated offenses is admissible at sentencing only if trial court determines that (1) the state has proven by "clear and convincing evidence" the defendant's connection with such offenses; (2) the evidence itself is competent and reliable; (3) the unrelated offenses have substantial probative value as to the defendant's character and propensities.

upon which one jury had already failed to convict. Accordingly, neither Landry nor Williams can save Mr. Spence's sentence from reversal.

210. In contrast to both Williams and Landry, the evidence presented and argued by the state at Mr. Spence's punishment hearing had already been rejected by the prosecution as insufficient to justify proceeding against Mr. Spence for the alleged sexual assault. Where, as here, the sentencing procedure includes the presentation of such manifestly unreliable evidence, then no guarantee exists that the sentence was based on "reason and not caprice or emotion." See Johnson v. Mississippi, 486 U.S. 578 (1988). This charge had never been evaluated by the judicial process of a trial -- the evidence, thus, had no guarantee of accuracy. Because the jury at Mr. Spence's capital murder trial was given unreliable information to consider in deliberating upon his punishment, this Court cannot be confident that his sentence of death satisfies the Constitutional demand of reliability.

211. In addition to its substantive unreliability, the admission of unadjudicated extraneous offenses violated the Fifth, Sixth, Eighth, and Fourteenth Amendments because Mr. Spence was deprived of notice that the State would employ such evidence against him. See S.F. Vol. XIV at 2101-2104. Gardner v. Florida emphasizes that Fourteenth Amendment due process requirements extend to capital sentencing procedures. 430 U.S. 349 (1977). In Gardner, a capital defendant challenged the trial

court's use, in deciding between life and death, of a presentence investigation report containing information which the defense was given no opportunity to explain or rebut. Reversing Gardner's sentence, the Supreme Court recognized that a defendant facing the death penalty "has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process." Id. at 358. The Court further explained that due process required that Gardner and his counsel be given a meaningful opportunity in the punishment hearing to challenge the evidence introduced against him, noting that "the quality, as well as the quantity, of the evidence on which the [jury] may rely" was a matter of constitutional import. Gardner, 430 U.S. at 359. To hold otherwise, the Court observed, would be to regard "the participation of counsel [as] superfluous to the process of evaluating the relevance and significance" of aggravating evidence. Id. at 360.

212. Gardner must be read to require fair notice to the defendant in a capital trial of the evidence which the State intends to present and argue to the jury in support of a sentence of death. Without notice, counsel cannot investigate the charges leveled or the witnesses who make them; without preparation, there can follow no meaningful "debate between adversaries ... essential to the truth-seeking function of trials." Id. at 360. In short, without notice there is no reliable hearing on punishment and the defendant is denied due process of law in the

determination of his sentence, and is further denied the effective assistance of counsel. See S.F. Vol. XIV at 2101-2103.

213. When the prosecution introduced evidence of unadjudicated extraneous offenses in support of affirmative answers to the special issues, it forced Mr. Spence to defend himself against these charges without benefit of this necessary procedural protection. Defense counsel argued, opposing the admission of such evidence, that the absence of notice that the prosecution would introduce it, had made impossible any adequate investigation of what the substance of Kader's testimony would be. Id.

214. Even if Mr. Spence suspected that the State might allege such offenses, that suspicion could not provide an adequate basis for preparing a defense. Suspicion is no substitute for fair and reasonably specific notice, in advance of trial, of the allegations which the State will present. Mr. Spence's punishment hearing was thus hopelessly one-sided, because without fair notice he could not possibly anticipate every charge or prepare effectively to counter them. The jury's answers to the special issues, resulting from a skewed process including the admission of highly prejudicial evidence of unadjudicated offenses, were not reliable. The Supreme Court has repeatedly condemned sentencing procedures which inject such an element of unreliability into jury deliberations in capital cases. See, e.g., Johnson v. Mississippi, 486 U.S. 578 (1988);

Caldwell v. Mississippi, 472 U.S. 320 (1985); Woodson v. North Carolina, 428 U.S. 280 (1976) Gardner, 430 U.S. 349 (1977).

215. Other states with death penalty statutes have recognized that due process requires that the defendant receive fair notice of the evidence in support of a death sentence which will be offered against him at sentencing. In Florida, for example, the aggravating factors which must be proven before a defendant may be sentenced to die are limited to those enumerated in a statutory list.[46] The list includes as an aggravating factor that "the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person," Fla. Stat. Ann. Sec. 921.141(5)(b). The Florida Supreme Court has held that because the statute's list of aggravating circumstances is exclusive, the defendant's due process right to adequate notice of the State's intention to use evidence of prior convictions is protected.[47] Johnson v. State, 438 So.2d 774 (1983), cert. denied 465 U.S. 1051 (1984). See also Hitchcock v. State, 413 So.2d 741 (1982), cert. denied 459 U.S. 960 (1983). If, as the Florida Supreme Court has held, due process requires the State to warn a defendant that it will proffer evidence of prior convictions, then a fortiori the State

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[46] Fla. Stat. Ann. Sec. 921.141(5)(a)-(h).

[47] It is worth noting that the Florida Supreme Court has prohibited the introduction of unadjudicated offenses in capital sentencing hearings. See, e.g., Odom v. State, 403 So.2d 936 (1981), cert. denied 456 U.S. 925; Perry v. State, 395 So.2d 170 (1980).

must warn him when it plans to introduce evidence of unadjudicated offenses. As one judge has put it,

> ... the defendant should be aware of such [prior] convictions, and records of convictions are easily discoverable by counsel. The same cannot be said of unadjudicated, extraneous offenses.

Garcia v. State, 581 S.W.2d 168, 180 n.1 (Roberts, J., concurring in the result). Only fair notice can give the defendant an opportunity to respond to evidence of such unadjudicated offenses.

216. Georgia also protects the right of defendants to adequate notice of the particular aggravating circumstances upon which the State will rely in seeking the death penalty. See, e.g., Fair v. State, 245 Ga. 868 (1980) (State may place capital defendant's prior record in issue only after compliance with notice limitations); see also Fletcher v. State, 157 Ga.App. 707 (1981) (defendant in criminal case must be fairly apprised of "what he must be prepared to meet"); State v. Black, 149 Ga.App. 389 (1979). Alabama, too, has held that aggravating circumstances must be alleged with particularity in the indictment of a capital case because due process requires that the State give the accused notice. Arthur v. State, 472 So.2d 650 (Ala. Crim. App. 1984), rev'd on other grounds, 472 So.2d 665 (Ala. 1985).[48] In California, state statutes protect the

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[48] Alabama, like Florida (see supra), forbids the introduction of unadjudicated offenses in capital sentencing hearings. See, e.g., Keller v. State, 380 So.2d 926 (Ala. Crim. App. 1979), cert. denied 380 So.2d 938 (Ala. 1980); Cook v. (continued...)

defendant's right to be forewarned of the coming evidence in support of a death sentence, particularly when that evidence concerns unadjudicated offenses.[49] In sum, other states where the death penalty is frequently imposed already recognize that the Constitution requires that the State give notice of the evidence it will rely on at the punishment phase, whether or not that evidence includes unadjudicated offenses.[50] Texas, on the

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[48](...continued)
State, 369 So.2d 1251 (Ala. 1979) (concepts of due process and presumption of innocence require that State not use unproven charges against defendant "in this life or death situation").

[49] West's Ann. Cal. Penal Code, Sec. 190.1-.3; see Keenan v. Superior Court of California, City and County of San Francisco, 177 Cal. Rptr. 841 (1981) (evidence of unadjudicated offenses may not be introduced in aggravation unless notice has been given to defendant within a reasonable time prior to trial).

[50] See also State v. Ortiz, 639 P.2d 1020, 1032 (Ariz. 1981) (en banc), cert. denied, 456 U.S. 984 (1982) (due process in a capital sentencing proceeding requires "disclosure of the evidence the State will use," "sufficiently in advance of the hearing that the defendant will have a reasonable time to prepare rebuttal;" Colo. Rev. Stat., § 16-11-103(a)(b) (Supp. 1989) (requiring that both sides give notice of the evidence to be relied on at sentencing, including names and addresses of witnesses to be called and the substance of their testimony); Idaho Code, § 19-2515(d) (1987) (if either party presents evidence not previously disclosed, the court is required upon request to adjourn the hearing until the surprised party has had a reasonable opportunity to respond to such evidence;" Ky. Rev. Stat. Ann. Sec. 532.025(1)(a) (Supp. 1988) (only such evidence as the State has made known to the defendant prior to the hearing shall be admissible); State v. Hamilton, 478 So.2d 123, 132 (La. 1985) (state must give notice that it intends to introduce evidence of unadjudicated offenses); Nev. Rev. Stat. Ann. § 175.552 (Supp. 1987) (evidence in aggravation must be disclosed to defense prior to hearing); Okla. Stat. Ann. tit. 21, § 701.10(c) (Supp. 1990) (same); Wyo. Stat. § 6-2-102(c) (Supp. 1989) (same).

contrary, readily admits evidence of unadjudicated offenses of which the defendant has received no fair warning.[51]

217. The Texas Court of Criminal Appeals, in the course of upholding its rule permitting the introduction of evidence of unadjudicated extraneous offenses in capital sentencing trials, has conceded that the absence of notice to the defendant prejudices his ability to prepare an adequate defense. In Williams v. State, 622 S.W.2d 116 (Tex. Crim. App. 1981), the court admitted that the admission of evidence of such offenses would violate due process if the defendant could demonstrate "unfair surprise." Id. at 120. Thus the Texas Court of Criminal Appeals does not deny that a defendant may be fatally prejudiced by the State's refusal to give him notice of the allegations he will have to rebut at sentencing, but shifts the burden to the defendant to prove that he had no notice. The U.S. Supreme Court, however, has never held that it is the defendant's obligation to make such a showing. On the contrary, the Constitution places that burden on the State.[52] See, e.g., United States v. Miller, 471 U.S. 130 (1985). In either event,

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[51] In non-capital cases in Texas in which the defendant has elected to be sentenced by a jury, however, evidence of extraneous offenses is only admissible at punishment if a conviction has resulted. Tex. Code Crim. Proc. Ann. Art. 37.07 Sec. 3(a) ("[t]he term prior criminal record means a final conviction in a court of record...."). This disparate treatment denies Mr. Spence equal protection of the law under the Fourteenth Amendment and also requires the reversal of his sentence.

[52] U.S. Const. Amend. VI. ("In all criminal prosecutions, the accused shall enjoy the right...to be informed of the nature and cause of the accusation....").

the concession of the Court of Criminal Appeals that Mr. Spence is entitled to relief if he can demonstrate "unfair surprise" requires an evidentiary hearing on this issue, in which Mr. Spence will present evidence that his attorneys were ambushed in precisely this unfair manner, and accordingly that his death sentence cannot stand.

218. The Supreme Court has held consistently that although "the fundamental requirement of due process is the opportunity to be heard," that opportunity "must be granted at a meaningful time and in a meaningful manner." Parratt v. Taylor, 451 U.S. 527 (1981), quoting Armstrong v. Manzo, 380 U.S. 545 (1965). In the context of capital sentencing, a "meaningful" hearing must include heightened standards of reliability and an opportunity both to present mitigating evidence and to challenge and rebut the State's case for the death penalty. See Gardner, 430 U.S. at 360. For a "meaningful" opportunity to prove that he should receive a life sentence rather than being condemned to die, a capital defendant in Texas deserves fair notice of the evidence the State will present at punishment if that evidence includes allegations of unadjudicated extraneous offenses. Without such reasonably specific notice, and the consequent opportunity to defend himself against those highly prejudicial accusations, a capital defendant in Texas is deprived of his right to due process of law under the federal constitution.

219. "Due process" is a flexible concept, whose meaning must be fleshed out and made whole in concrete contexts, rather

than in the abstract. As the Supreme Court noted in Morrissey v. Brewer, due process "calls for such procedural protections as the particular situation demands," since "not all situations calling for procedural safeguards call for the same kind of procedure." 408 U.S. 471, 481 (1972). In Mr. Spence's case, however, the absence of notice made useless any other protections available to him. Even the most basic safeguard, the assistance of counsel, was vitiated by the State's failure to give notice of the charges it would level at Mr. Spence, thereby assuring that defense counsel would be unable to prepare to defend Mr. Spence against the State's evidence at the punishment phase. See Gardner, 430 U.S. at 360. However "flexible" the notion of due process, it cannot stretch to countenance such a one-sided proceeding when a defendant's life is at stake.

220. Third, the admission of evidence of unadjudicated offenses violated Mr. Spence's right under the Fourteenth Amendment to equal protection of the laws. In non-capital cases in Texas in which the defendant has elected to be sentenced by a jury, evidence of extraneous offenses is only admissible at punishment if a conviction resulted. Tex. Code Crim. Proc. Art. 37.07 § 3(a) ("[t]he term prior criminal record means a final conviction in a court of record...."). Thus, Texas law extends greater protection against unreliable sentencing to defendants who face lesser sentences; the Constitution cannot tolerate such a practice. The sentencing procedure thus deprived Mr. Spence of

due process and violated his Fifth, Sixth, Eighth and Fourteenth Amendment rights as guaranteed by the United States Constitution.

221. Fourth, the admission of evidence of unadjudicated offenses also violated Mr. Spence's rights under the constitution because the jury was given no instructions on how to consider that evidence. Even if a properly instructed jury could have considered such evidence without violating Mr. Spence's right to a reliable determination of his punishment, this jury was given no instruction on, for example, what burden of proof to apply or what use they might make of this evidence in their deliberations. Contrast Williams, 814 F.2d at 208 ("properly applied standards of relevance and sufficiency of proof" are necessary to ensure that constitutional safeguards are observed when allegations of unadjudicated offenses are presented by the State and relied upon by the jury in sentencing).

222. In the absence of particularized instructions, the jury in answering the special issues was free to speculate with respect to whatever "crime" it decided to consider that Mr. Spence had committed. In short, because Mr. Spence was deprived of the essential protections of due process in defending himself against this accusation, there is no way to determine what evidence the jury found in support of its affirmative answers; a verdict at sentencing based on unadjudicated allegations, neither confined nor informed by careful jury instructions on evidence and the burden of proof, is, by definition, unreviewable. This consequence likewise violates Mr. Spence's constitutional rights

to due process and a reliable determination of sentence. See Gregg v. Georgia, 428 U.S. 153 (1976).

223. Mr. Spence was thus deprived of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments and his sentence cannot stand.

THE PROSECUTORS INTRODUCED EVIDENCE WHICH THEY KNEW PERTAINED TO A WHOLLY UNRELATED OFFENSE AS SUBSTANTIVE EVIDENCE OF THE CAPITAL MURDER. THEY THUS FORCED THE DEFENSE TO ELICIT FURTHER TESTIMONY ABOUT THE UNRELATED -- AND OTHERWISE INADMISSIBLE -- EXTRANEOUS OFFENSE TO REBUT THE INFERENCE OF GUILT IN THE CASE AT BAR.

224. At the guilt phase of trial, the State offered evidence pertaining to a wholly extraneous offense for which Mr. Spence had already been convicted, and proffered it as substantive evidence of his guilt in this case. Specifically, the prosecutors elicited from witness Dorothy May Miles statements that Mr. Spence allegedly made to her acknowledging his involvement in a separate offense, for the purpose of suggesting that the statements were in fact admissions of his involvement in the lake murders. As a result, in order to refute the State's suggestion that the statements constituted admissions of his guilt in the instant case, the defense was compelled to establish on cross-examination that Ms. Miles was aware that Mr. Spence had committed a separate offense for which he had already been tried and convicted, and to which Mr. Spence's statements referred. The State's deliberate misuse of such evidence violated Mr. Spence's fundamental due process rights under the United States Constitution and the laws and Constitution of the

State of Texas, and thus Mr. Spence's conviction and death sentence cannot stand.

225. During its case-in-chief, the State presented the testimony of Dorothy May Miles. Ms. Miles testified that she had been a friend of Mr. Spence's since he was a boy growing up in the neighborhood, and that he, like many of the other kids in the neighborhood, had always called her "Mom." S.F. (trial) Vol. III at 488-89. Ms. Miles further testified that during the summer of 1982, Mr. Spence came over to her house on a regular basis to talk with her and to watch television. S.F. (trial) Vol. III at 492. Ms. Miles recounted that on one such occasion, in early September, 1982, Mr. Spence had come over to her house late at night and told her that he had "done something bad." When asked what it was, Mr. Spence said, 'I've cut somebody.'" S.F. (trial) Vol. III at 500-01. According to Ms. Miles, when she asked Mr. Spence whether the person was alive or dead, Mr. Spence answered that he did not know, but that he "bet [the person] don't bug me anymore." Id. The prosecutors' clear objective in eliciting this testimony was to suggest that Mr. Spence had confided to Ms. Miles his guilt in the stabbing deaths at Lake Waco.

226. At the close of direct examination, the defense objected to Miles' testimony on the grounds that the statements referred to an unrelated sexual assault for which Mr. Spence had already been tried and convicted. S.F. (trial) Vol. III at 502. The prosecutor responded that while it was possible that the statements were made after the unrelated sexual assault had been

committed, "it's not for the State to have to figure out who the defendant is talking about cutting, whether it is [the victim of the unrelated sexual assault] or Kenneth Franks," S.F. (trial) Vol. III. at 503, in order to introduce the statement as an admission of the defendant.[53] The prosecutor reiterated this argument again later, stating that "if [Spence has] gone around hurting so many people that it's hard to keep them straight, that's not our problem, if he's making these admissions about killing and hurting and cutting people, and not distinguishing who they are." S.F. (trial) Vol. III at 505-06. Defense counsel pointed out that the State's introduction of Miles' ambiguous testimony forced the defense to elicit otherwise inadmissible evidence of the extraneous offense in order to explain that the statements did not pertain to the murders. S.F. (trial) Vol. III at 506. Furthermore, the defense argued that the State, by offering the testimony directly to the jury without first obtaining a ruling on the admissibility of the evidence, had violated the defense's motion in limine regarding evidence of extraneous offenses. S.F. (trial) Vol. III at 507. The trial court overruled the defense's objections. Id.

227. The defense was thus forced to attempt to clarify Ms. Miles' testimony. On cross-examination, defense counsel elicited from her that she was aware that Mr. Spence had been arrested in September for cutting somebody, that he had gone to jail for that

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[53] It is worth noting, of course, that even the stabbing of "Kenneth Franks" was extraneous to the offense for which Mr. Spence was on trial -- the murder of Jill Montgomery.

offense, and that that incident was completely unrelated to the lake murders. S.F. (trial) Vol. III at 513.

228. In accordance with due process, the State may neither solicit false evidence at trial nor fail to correct false evidence when it appears at trial. Napue v. Illinois, 360 U.S. 264, 268 (1958); Alcorta v. Texas, 355 U.S. 28 (1957); Pyle v. Kansas, 317 U.S. 213 (1942); Mooney v. Holohan, 294 U.S. 103 (1935). When the State presents false and misleading testimony, due process is violated when the prosecution knew or should have known that the testimony was perjured or misleading. "It does not matter whether the prosecutor actually knows that the evidence is false; it is enough that he or she should have recognized the misleading nature of the evidence." Duggan v. State, 778 S.W.2d 465, 468 (Tex. Cr. App. 1989); United States v. Agurs, 427 U.S. 97, 103 (1976) (due process violated if prosecution "knew or should have known" the evidence was false).

229. In this case, there can be no doubt that the prosecution recognized the "misleading nature of the evidence"; indeed, it was this very quality of the testimony that the prosecution succeeded in exploiting to its advantage. Certainly the prosecution was aware of the occurrence of the unrelated sexual assault and its proximity in time to when Mr. Spence made the alleged statements to Ms. Miles, since District Attorney Vic Feazell had successfully prosecuted Mr. Spence for that offense. In fact, it was during the course of the investigation of the unrelated sexual assault case that law enforcement officials

first learned of Ms. Miles' conversations with Mr. Spence. However, despite their awareness of the ambiguity of Ms. Miles' testimony and the possibility that the statements referred to wholly extraneous and inadmissible offenses, the prosecutors intentionally chose not to clarify the issue. Instead, they forced the defense to put on evidence of a highly prejudicial and otherwise inadmissible extraneous offense.

230. The misleading and irrelevant testimony offered by the State through Ms. Miles was extraordinarily prejudicial to Mr. Spence. In order to demonstrate to the jury that Mr. Spence's statements to Ms. Miles were not admissions of involvement in the charged offenses, the defense was compelled to establish on cross-examination that Mr. Spence had been charged and convicted of a separate and unrelated offense. Thus the State was able to force the defendant to elicit evidence of an extraneous offense that the State could not itself offer. Moreover, the inherent prejudice that always results from the introduction of evidence of an unrelated extraneous offense was compounded in this case by the factual similarities between the two offenses.

231. A capital murder trial is not a game. The State's obligation is to do justice, not to seek the short-term victories of gamesmanship. Berger v. United States, 295 U.S. 78, 80 (1935). Consequently, when the State knows that testimony is false, it cannot rely upon that testimony to secure a conviction; few rules are more clearly established in constitutional criminal jurisprudence than this. Mooney v. Holohan, 294 U.S. 103 (1935);

Napue v. Illinois, 360 U.S. 264 (1959). When the State presents such false or misleading testimony, "a new trial is required if 'the false testimony could ... in any reasonable likelihood have affected the judgment of the jury.'" Giglio, 495 U.S. at 154; Napue, 360 U.S. at 271; Ex Parte Adams, 768 S.W.2d at 292 (Tex. Crim. App. 1989). Indisputably, under this standard, the facts of Mr. Spence's case require reversal of his conviction.

THE TRIAL COURT'S DENIAL OF THE DEFENDANT'S MOTION FOR APPOINTMENT OF A FORENSIC EXPERT TO ANALYZE PHYSICAL EVIDENCE DEPRIVED THE DEFENDANT OF DUE PROCESS, EFFECTIVE ASSISTANCE OF COUNSEL, AND A FAIR TRIAL

232. Trial counsel for petitioner sought and was denied the assistance of a forensic expert to analyze hair samples obtained from Ronnie Lee Breiten and compare them to foreign hair samples recovered at the scene. S.F. Vol. XI at 1747-48. Without the aid of the requested expert assistance, petitioner's counsel could not effectively secure petitioner's rights to due process and establish his defense. Ake v. Oklahoma, 470 U.S. 68 (1985). The trial court's failure to grant counsel's request for the assistance of a forensic expert violated petitioner's rights to due process as protected by the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and the laws and Constitution of the State of Texas.

THE TRIAL COURT ERRED IN PRECLUDING THE DEFENSE FROM PRESENTING CRITICAL DEFENSE EVIDENCE, THEREBY DENYING PETITIONER THE RIGHTS TO DUE PROCESS, EFFECTIVE ASSISTANCE OF COUNSEL, AND THE RIGHT TO PRESENT A DEFENSE

233. The trial court erred in precluding the defense from presenting critical defense evidence, including the testimony of several witnesses as well as physical evidence, that would have supported the defense theory that the crimes were committed by individuals other than the defendant. As such, the court's ruling denied the petitioner of the fundamental right to present a defense, as guaranteed by the United States Constitution and the laws and Constitution of the State of Texas.

234. Under a trial court order granting a motion in limine by the State, the defense was required to proffer to the court the testimony of any witness tending to establish that the offense was committed by someone other than the Defendant before presenting that evidence to the jury. Pursuant to that order, the defense offered the testimony of Catherine Breiton, Sharon Hittle, and Marvin Horton in support of its theory that the offense was committed by individuals other than Mr. Spence. Over defense objection, the trial court granted the State's motion in limine and excluded the proffered testimony of these witnesses as well as proffered physical evidence tending to show that the crimes were committed by persons other than Mr. Spence.

235. Through the above witnesses, the defense sought to show a connection between witness Catherine Breiton's son-in-law, Ronnie Lee Breiton, and accused [and subsequently convicted?] multiple-murderer James Russell Bishop, who the defense asserted were together involved in the commission of the lake murders. The defense proffered the testimony of Catherine Breiton to

establish that Ronnie Breiton arrived at home on the morning after the murders with blood on his clothes; that he stated that he had been out at the lake the night before "fishing and drinking"; that he claimed he'd lost his knife the night before; and that he was the husband of Joyce Breiton, who was the cashier at the Piggly Wiggly who cashed two of the decedents' paychecks the day before. The defense proffered the testimony of Sergeant Marvin Horton to establish that the Waco Police Department had investigated James Russell Bishop as a possible suspect in the lake murders; that Bishop was a suspect because he had been charged with a factually similar offense in California; that they had determined that he was living in Waco at the time of the murders and could not establish an alibi for the night in question; and that he had failed one of two polygraph examinations that were administered. Finally, the defense proffered the testimony of Sharon Hittle, a friend of Joyce Breiton, to establish that Ronnie Breiton and James Bishop knew each other through her account of having been introduced to Bishop on one occasion through the Breitons. With this evidentiary foundation, the defense intended to present evidence of comparisons of Breiton's and Bishop's bite mark impressions and hair samples with those found at the scene.

236. After hearing the proffered testimony from Ms. Breiton, Ms. Hittle, and Sgt. Horton, the trial court allowed the State to call two witnesses to rebut the proffered testimony. S.F. Vol. III (testimony of Dennis Baier, at 1707-28, and Thomas

Hittle, at 1732-44). At the conclusion of all of the testimony, the trial court concluded that it saw "no relevancy or materiality to the admission of the hair samples" or bite mark impressions of Mr. Breiton or Mr. Bishop, id. at 1748, and ruled that the evidence was not admissible.

237. As the Supreme Court stated in Washington v. Texas, 388 U.S. 14 (1967):

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. The right is a fundamental element of due process of law.

388 U.S. at 19.

238. The exclusion by the trial court of the testimony of defense witnesses Catherine Breiton, Sgt. Marvin Horton, and Sharon Hittle, as well as the exclusion of any evidence of Ronnie Lee Breiton's and James Russell Bishop's bite mark impressions or hair samples, violated Mr. Spence's right to present a defense, due process, and effective assistance of counsel. Mr. Spence's conviction and sentence of death cannot stand.

THE TRIAL COURT DENIED MR. SPENCE HIS RIGHTS TO DUE PROCESS OF LAW, A RELIABLE DETERMINATION OF GUILT AND SENTENCE, AND A FUNDAMENTALLY FAIR TRIAL, BY FAILING TO DEFINE THE TERM "REASONABLE DOUBT" IN ITS CHARGE AT BOTH PHASES OF TRIAL EVEN THOUGH IT REFUSED TO INSTRUCT THE JURY ON THE LAW OF CIRCUMSTANTIAL EVIDENCE.

239. At both the guilt/innocence and punishment stages of trial, the trial court's charge to the jury failed to define the

term "reasonable doubt." See Tr. Vol. V at ___ (charge of the court at the guilt phase). Defense counsel specifically requested that the court include such an instruction in its charge at guilt-innocence, to ameliorate the impact of the court's decision not to charge the jury concerning circumstantial evidence. S.F. (trial) Vol. XII at 1877. The court refused. Id. In the absence of a charge on circumstantial evidence, this omission of a necessary and proper charge violated Mr. Spence's rights under Article 2.01 of the Texas Penal Code, Article 38.03 of the Texas Code of Criminal Procedure, and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Mr. Spence's conviction and sentence cannot stand.

240. The term "reasonable doubt" is not defined by state statute in Texas, nor has the Court of Criminal Appeals ever held that a definition of "reasonable doubt" should be given. Indeed, prior pronouncements of that court have criticized trial judges for attempting to define the "reasonable doubt." See e.g. Massey v. State, 1 Tex. App. 563, 570 (1877); Young v. State, 648 S.W. 2d 2, 3 (Tex. Crim. App. 1983) (Onion, P.J., concurring).

241. However, Mr. Spence contends that the failure of the charge to define the term "reasonable doubt" in this case violated his rights to (1) the right to due process of law and due course of law, as guaranteed by the Fourteenth Amendment to the United States Constitution and the Constitution of the State of Texas; (2) the right to a reliable jury verdict, as guaranteed

by the Sixth, Eighth, and Fourteenth Amendments to the constitution of the United States and Article I, § 19 of the Texas constitution; (3) the right to a reliable jury verdict, as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States and Article I, §§ 10 and 13 of the Texas Constitution; (4) the right to a unanimous jury verdict, as guaranteed by Article V, § 13 of the Texas constitution and Article 36.29 and 37.071 of the Texas Code of Criminal Procedure, and (5) § 2.01 of the Texas Penal Code and Articles 38.03 and 37.071 of the Texas Code of Criminal Procedure.

242. Section 2.01 of the Texas Penal Code and Article 38.03 of the Texas Code of Criminal Procedure require proof beyond a reasonable doubt before an accused may be convicted of a crime. Article 37.071 of the Texas Code of Criminal Procedure requires proof beyond a reasonable doubt before the jury may return an affirmative answer to any of the special issues employed to assess a death sentence. These provisions reflect the requirements of due course of law, as embodied in Article I, § 19 of the Texas Constitution, and federal constitutional protections as established by the Supreme Court. In Re Winship, 397 U.S. 358 (1970).

243. Federal courts throughout the country uniformly define the term "reasonable doubt" for juries in criminal cases. See Hankins v. State, 646 S.W.2d 191, 201 n. 3 (Tex. Crim. App. 1981) (Miller, J., concurring and dissenting). Moreover, the federal

district courts within the geographic area covered by the United States Court of Appeals for the Fifth Circuit submit definitions to juries that provide the jurors with one, uniform standard to be applied in determining whether the prosecution's proof is sufficient to deprive a citizen of life or liberty.

244. Despite the clear import of this federal practice in Texas and throughout the United States, the Texas Court of Criminal Appeals has long held that trial judges should not attempt to define the term "reasonable doubt" for juries in criminal cases. The Texas court has attempted to justify its refusal so to charge the jury on two grounds: (1) that the term is readily understandable; and (2) that any effort to define it would impermissibly confuse the jurors. The Court of Criminal Appeals has refused to abandon this demonstrably outdated position despite the fact that Judges throughout this State uniformly instruct juries in criminal cases on the matters currently covered by Section 2.01 and Article 38.03 (namely, the requirement of proof "beyond a reasonable doubt") and despite knowledge of the considered practice of the federal courts.

245. In Re Winship recognized the evidentiary standard of "proof beyond a reasonable doubt" as "impress[ing] on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." 397 U.S. at 364. Certainly due process mandates more than lip service to the standard. Indeed, when the Court of Criminal Appeals eliminated the requirement that a

charge on circumstantial evidence be given,[54] it did so on the basis that numerous other states did not require such a charge "where the jury is properly instructed on the reasonable doubt standard" 646 S.W.2d at 197. Surely, then, when a court refuses -- as the court did in Mr. Spence's case -- to instruct the jury concerning circumstantial evidence, it must "properly instruct[] on the reasonable doubt standard" by defining that key term.

246. Similarly, in Taylor v. Kentucky, 436 U.S. 478 (1978), the Supreme Court held that even when a charge defining the term "reasonable doubt" is given, a charge on the presumption of innocence is mandated by the due process clause to safeguard against a dilution of the principle that guilt is to be established by probative evidence beyond a reasonable doubt. 436 U.S.at 486. In so doing, the Supreme Court noted that the definition of "reasonable doubt" given by the trial court in Taylor was not a "model of clarity" and might have in itself been reversible error. Id. at 488.

247. The trial court's charge in Taylor defined "reasonable doubt" to mean "a substantial doubt, a real doubt, in that you must ask yourself not whether a better case might have been proved, but whether after hearing all the evidence you actually doubt that the defendant is guilty." Id. at 481 n. 7. thus, the Court plainly indicated that an incorrect definition could violate due process. If an incorrect definition could violate due process, by leaving the jurors misinformed concerning the

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[54] See Hankins v. State, supra.

constitutionally mandated standard of proof, then indisputably the failure to give any definition (and thereby allowing up to 12 different, personal and potentially erroneous definitions to be employed) violates due process.

248. Furthermore, the failure to define the term "reasonable doubt" also renders jury verdicts at the guilt/innocence and punishment stages unreliable, because when certain terms are left undefined the juror has the discretion to disregard them. In addition, the Supreme Court has held that the ultimate penalty available in capital cases mandates a heightened need for reliability at both the guilt/innocence and punishment stages. Beck v. Alabama, 447 U.S. 625 (1980); Lockett v. Ohio, 438 U.S. 586 (1978); Mills v. Maryland, 486 U.S. 367 (1988).

249. In light of the requirement of heightened reliability in capital cases, it is plain that a process (i.e., jury deliberations) in which as many as twelve different, personal and potentially conflicting definitions of a critical term "i.e. reasonable doubt", are used is inherently unreliable. Moreover, not only is the process inherently unreliable, but a fortiori the results of the guilt/innocence and punishment stages are likewise unreliable. This unreliability stems from the fact that the term "proof beyond a reasonable doubt" is not susceptible to common understanding; a definition is in fact necessary to ensure that

all twelve jurors are using the same standard, a minimum requisite of due process and due course of law.[55]

250. This inherent unreliability violates the accused's right to jury unanimity, which is guaranteed by Article 5, § 13 of the Texas Constitution and Articles 36.29 and 37.071 (as to special issues) of the Code of Criminal Procedure. See Molandes v. State, 571 S.W.2d 3, 4 (Tex. Crim. App. 1974). Without a uniform definition of the term "reasonable doubt," the jurors in a criminal case are necessarily utilizing whatever definition (or standard) they personally embrace, thereby allowing up to twelve different definitions to be applied (and permitting some jurors to decrease the State's burden by applying an unconstitutionally lenient standard of proof). This problem is compounded by the fact that trial courts typically do not give a separate instruction on jury unanimity. Rather, the Court's charge will normally mention in passing that the jury must select a foreman and that it is the foreman's duty to preside at the deliberations and to vote with the other jurors in arriving at a unanimous

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[55] Any attorney who has ever conducted voir dire knows firsthand that veniremen do not have consistent, uniform definitions of the term "reasonable doubt." See, e.g., Wilkerson v. State, 726 S.W.2d 542 (Tex. Crim. App. 1986); Sawyer v. State, 724 S.W.2d 24 (Tex. Crim. App. 1986); Phillips v. State, 701 S.W.2d 875 (Tex. Crim. App. 1985 [veniremen properly excused for bias due to stricter standard of proof than that allowed by law]. Indeed, in Young v. State, 648 S.W.2d 2, Judge Miller, with Judge Clinton concurring, noted that the historical underpinnings of the admonition against defining the term for the jury were outdated. Id. at 4. Earlier still, in Hankins, Judge Miller had noted the Court's failure to allow a definitional despite the elimination of a requirement for a charge on circumstantial evidence.

verdict. See McCormick & Blackwell, 8 Texas Practice, § 80.17 (1985). Cf. Mills v. Maryland, supra.

251. Furthermore, the failure to define "reasonable doubt" also violates the Eighth and Fourteenth Amendments, because the heightened need for reliability in capital cases dictates that a definition of the term "reasonable doubt" be given. In a capital felony where death is assessed, the Eighth and Fourteenth Amendments require that such a key term be defined with particularity. The trial court's failure so to charge the jury violated Mr. Spence's rights in the manifold manners set out above, and requires that this Court reverse his conviction and sentence of death.

PRAYER FOR RELIEF

WHEREFORE, Applicant David Wayne Spence prays that this Honorable Court:

1. Vacate his unlawfully obtained conviction;
2. Vacate his unlawfully obtained sentence of death;
3. Grant Mr. Spence a full and fair evidentiary hearing on all claims raised herein and on all affirmative defenses raised by the State in its response;
4. Grant Mr. Spence full and complete discovery pending said evidentiary hearing;[56]

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[56] A comprehensive Motion for Discovery will be filed by undersigned counsel as soon as possible.

5. Grant such other relief as law and justice require.

Respectfully submitted,

Robert C. Owen
Texas Bar No. 15371950

Eden E. Harrington
Texas Bar No. 09048000
Raoul D. Schonemann
District of Columbia
Bar No. 421222

Texas Resource Center
1206 San Antonio St.
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512/320-8300

Attorneys for
David Wayne Spence

County of Travis)
)
State of Texas)

Affidavit of Verification

Before me, the undersigned authority, on this day personally appeared Robert C. Owen who, being duly sworn, stated as follows:

"My name is Robert C. Owen. I am one of the attorneys representing David Wayne Spence. I have communicated with Mr. Spence and I am authorized to state on his behalf that it is his desire to have a full and complete review at the Texas Court of Criminal Appeals and all other state and federal courts of every issue that might result in a reversal of his conviction or sentence of death.

I have read the attached Petition for Writ of Habeas Corpus. I am familiar with the factual matters set forth therein and they are, according to my information, knowledge and belief, true and accurate.

FURTHER AFFIANT SAYETH NOT."

Robert C. Owen

Subscribed and sworn before me this 16th day of October, 1991.

Notary Public

ELIZABETH COHEN
MY COMMISSION EXPIRES
May 25, 1994

Certificate of Service

I hereby certify that I served a true and correct copy of the above pleading on the opposing party by hand-delivering same on October 16, 1991, to:

Office of District Attorney
McLennan County Courthouse
Waco, Texas

APPENDIX A

FILED
6th day of July 1984
at 5:17 O'Clock P M.
JOE JOHNSON
DISTRICT CLERK
McLennan County, Texas
By Janice Long
Deputy

NO. 83-559-C

THE STATE OF TEXAS

VS.

DAVID WAYNE SPENCE

IN THE DISTRICT COURT

54TH JUDICIAL DISTRICT

McLENNAN COUNTY, TEXAS

ON THE 22nd DAY OF May, 1984, THE ABOVE ENTITLED AND NUMBERED CAUSE WAS CALLED FOR TRIAL, AND THE DEFENDANT, David Wayne Spence, AND THE DEFENDANT'S COUNSEL, Russell Hunt and L. Hayes Fuller, AND THE STATE'S ATTORNEYS, ALL BEING PRESENT IN OPEN COURT, AND THE DEFENDANT HAVING BEEN DULY ARRAIGNED IN OPEN COURT, AND HAVING PLEADED NOT GUILTY OF THE CHARGES CONTAINED IN THE INDICTMENT HEREIN, BOTH PARTIES ANNOUNCED READY FOR TRIAL: THEREUPON A JURY OF GOOD AND LAWFUL PERSONS, TO-WIT: Glenn H. Wendell, AND ELEVEN OTHERS, WAS DULY SELECTED, IMPANELED AND SWORN, WHO, HAVING HEARD THE INDICTMENT READ, AND THE DEFENDANT'S PLEA OF NOT GUILTY THERETO, AND HAVING HEARD THE EVIDENCE SUBMITTED, AND HAVING BEEN DULY CHARGED BY THE COURT, AND HAVING HEARD THE ARGUMENT OF COUNSEL, RETIRED IN CHARGE OF THE PROPER OFFICER TO CONSIDER OF THEIR VERDICT, AND AFTERWARD, TO-WIT: ON THE 3rd DAY OF July, 1984, SAID JURY WAS BROUGHT INTO OPEN COURT BY THE PROPER OFFICER, THE DEFENDANT, AND THE DEFENDANT'S COUNSEL BEING PRESENT, AND IN THE FORM OF LAW RETURNED INTO OPEN COURT THE FOLLOWING VERDICT, WHICH WAS RECEIVED BY THE COURT AND IS HERE AND NOW ENTERED UPON THE MINUTES OF THE COURT, TO-WIT:

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"We, the jury, find the Defendant, David Wayne Spence guilty of the offense of Capital Murder, as alleged in the indictment. /s/ Glenn H. Wendell, Foreperson."

And thereafter, said jury having heard the evidence submitted upon the question of punishment, and having been duly charged by the Court, and having heard the argument of counsel, were again retired in charge of the proper officer, to consider of their verdict of punishment, and afterward, to-wit; on the 6th day of July, 1984, said jury was brought into open court by the proper officer, the defendant, and the defendant's counsel being present, and in due form of law returned into open court the following verdict, which was received by the Court and is here and now entered upon the minutes of the Court, to-wit:

"SPECIAL ISSUE NO. 1

"Was the conduct of the Defendant, David Wayne Spence, that caused the death of the deceased, Jill Montgomery, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

"ANSWER

"We, the Jury, unanimously find and determine beyond a reasonable doubt that the answer to this Special Issue is 'Yes'. /s/ Glenn Harrison Wendell, Foreperson.

"SPECIAL ISSUE NO. 2.

"Is there a probability that the Defendant, David Wayne Spence, will commit criminal acts of violence that would constitute a continuing threat to society?

"ANSWER

"We, the Jury, unanimously find and determine beyond a reasonable doubt that the answer to this Special Issue is 'Yes'. /s/ Glenn Harrison Wendell, Foreperson."

"We, the Jury, return in open court the foregoing answers as our answers to the Special Issues submitted to us, and the same is our verdict in this case. /s/ Glenn Harrison Wendell, Foreperson."

IT IS, THEREFORE ADJUDGED BY THE COURT that the Defendant, David Wayne Spence, is guilty of the offense of Capital Murder, as found by the jury, and that said offense was committed on the 13th day of July, 1982, and that said Defendant be punished therefor by death by injection, as provided by law, and that the State of Texas do have and recover of said Defendant all costs in the prosecution expended.

JUDGE PRESIDING